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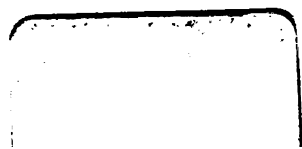
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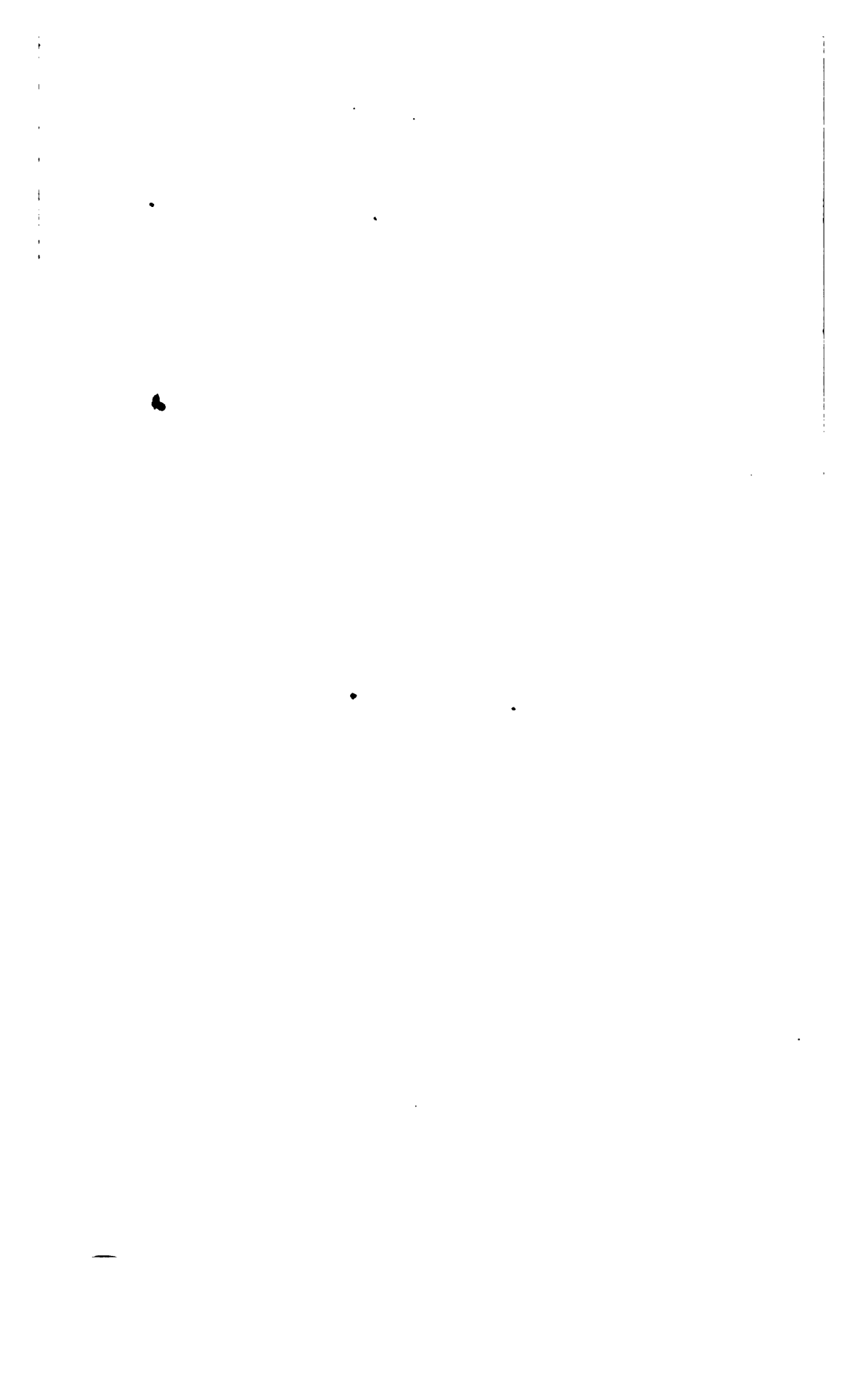
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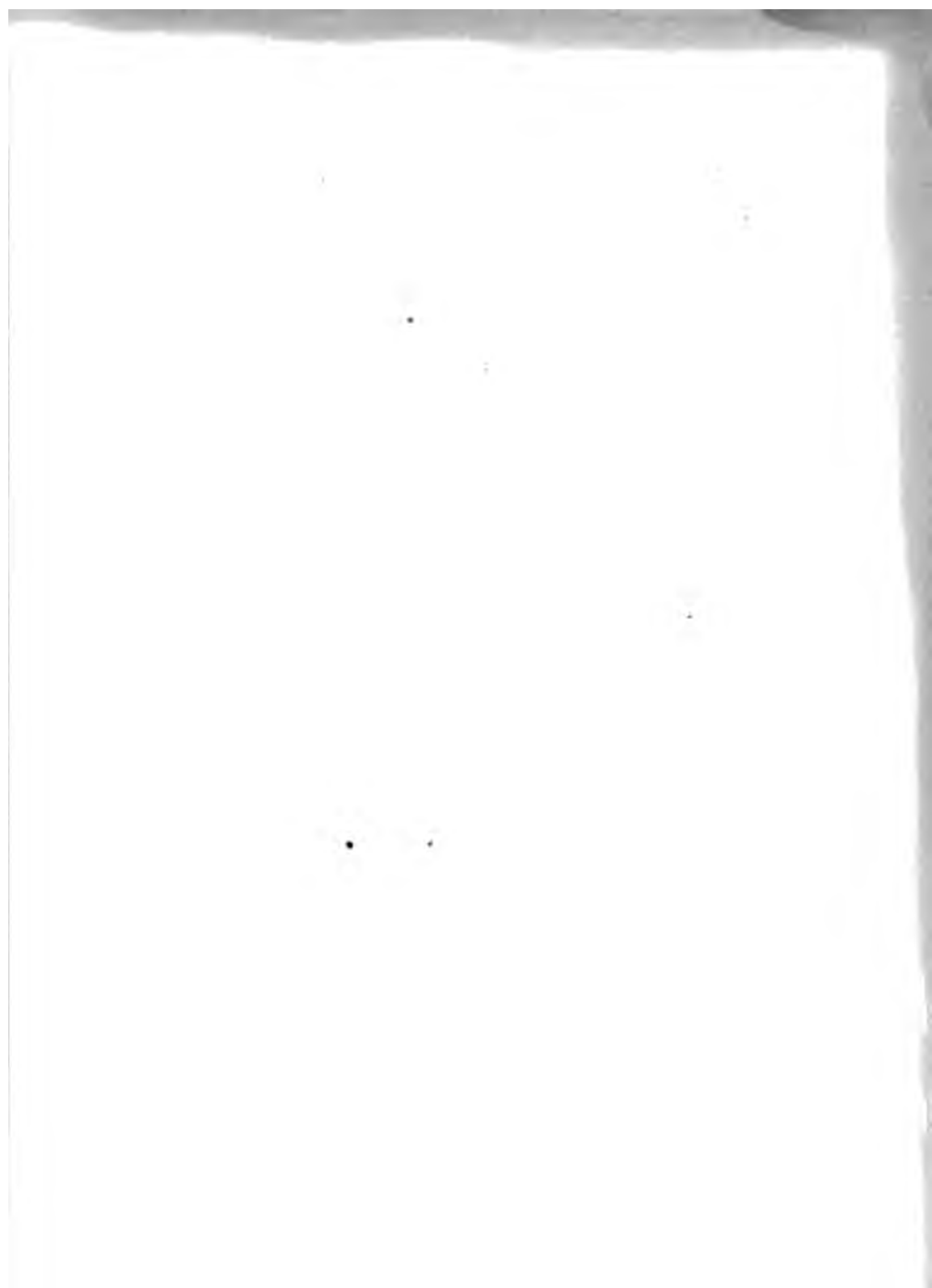
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A TREATISE
ON THE
PUBLIC LAND SYSTEM
OF THE
STANFORD LIBRARY
UNITED STATES.

WITH REFERENCES TO THE
LAND LAWS, RULINGS OF THE DEPARTMENTS AT WASHINGTON,
AND DECISIONS OF COURTS,

AND AN
APPENDIX
OF
FORMS IN UNITED STATES LAND AND MINING MATTERS.

By GEORGE W. SPAULDING,
Of the Sacramento Bar.

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PREFACE.

THIS volume has been prepared with a view of furnishing in a compact and convenient form, a reliable work upon all the subjects embraced under our public land system. Each subject is treated in one or more chapters, as will be observed by reference to the table of contents.

It has been the constant aim of the writer to give the practitioner not only all the statutes, but also to furnish him with an abstract of the principal decisions on each subject in cases determined by the higher courts of our country, with reference to or in any wise touching the public land laws of the United States.

During the year 1880, the Public Land Codification Commissioners rendered their final report as such commissioners to Congress, which report embraced some two thousand printed pages in four volumes, the first being entitled "United States Land Laws, general and permanent;" the second entitled "The Public Domain;" and the last two embracing exclusively laws local and temporary in their character.

The work of this commission has been of great assistance to the author, and from it he has quoted freely, and this he has done with all the greater pleasure knowing that the work of the commission has been inaccessible to the general public, and almost entirely so to such persons of the legal profession as have not been fortunate enough to be near some state or public library. Though the work now offered may be found imperfect in some particulars, yet it is hoped that many of our brother lawyers and practical business men will find it valuable.

THE AUTHOR.



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TREATISE
ON THE
PUBLIC LAND SYSTEM
OF THE
UNITED STATES.

CHAPTER I.

THE PUBLIC DOMAIN.

- § 1. Definition of, and How Acquired.
- § 2. Cessions by States.
- § 3. Cession from France.
- § 4. Cession from Spain.
- § 5. Cession from Mexico.
- § 6. Cession from Texas.
- § 7. Cession from the Republic of Mexico.
- § 8. Cession from Russia.
- § 9. Control and Disposition of the Public Domain.
- § 10. Surveyed and Unsold Lands.
- § 11. Unsurveyed Lands.
- § 12. Cost of Public Domain.
- § 13. Receipts from Public Domain.

The *National Domain* is the total area, land and water, embraced within the boundaries of the United States.

§ 1. *Definition of the Public Domain, and How Acquired.*—The *Public Domain* embraces lands known in the United States as “public lands,” lying in certain states and territories known as the “land states and territories,” and was acquired by the government of the United States by treaty, conquest, cession by states, and purchase, and is disposed of under and by authority of the national government. It contained 2,894,235.91 square miles, or 1,852,310,987 acres. Deducting the area of Tennessee, the actual public domain was 1,821,700,922 acres.

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§ 2. *Cessions by States to the National Government.*—The territory embraced within the present states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Tennessee, that part of Minnesota lying east of the Mississippi river, and all of Alabama and Mississippi lying north of the thirty-first parallel, was held by Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina, and Georgia, under grants from Great Britain, during their colonial condition. These territorial interests were surrendered to the general government of the Union by the last-named states at different times, and constituted the nucleus of our public domain with some reservations as to former grants, and was the remainder of the territory conceded to the United States under the definitive treaty of 1783, and consisted of 404,955.91 square miles, or 259,171,787 acres. This was the public domain of the United States on April 30, 1803, the date of the Louisiana purchase, and for which the original survey and disposition laws were made.

The United States were recognized by the crown in the definitive treaty of peace with Great Britain as "free, sovereign, and independent states, and he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, proprietary and territorial rights of the same, and every part thereof."

The subsequent acquisitions to the public domain are as follows:

§ 3. (1) *From France.*—From France, April 30, 1803, under the administration of President Jefferson, known as the Louisiana purchase, done by treaty at Paris, France, by Robert R. Livingston and James Monroe on behalf of the United States, and Barbé Marbois on behalf of the First Consul, Napoleon Bonaparte, in the name of the French republic. This embraced, as finally settled, those portions of the states of Alabama and Mississippi south of the thirty-first parallel; the entire surface of the states of Louisiana, Arkansas, Missouri, Iowa, Nebraska, and Oregon; all of Minnesota west of the Missouri river; all of Kansas except a small portion west of the one hundredth meridian and south of the Arkansas river; all of Dakota, Montana, Idaho, Washington, and Indian Territories, with a part of Wyoming and Colorado. This cost, according to the original treaty stipulation, 60,000,000 francs, or \$15,000,000, in money and stocks; the interest on the stocks to time of redemption, \$8,529,353; claims of citizens of United States due from France paid by United States, \$3,738,268.98; a total of

\$27,267,621.98, and added to the public domain 1,182,752 square miles, or 756,961,280 acres.

§ 4. (2) *From Spain*.—From Spain, by treaty, February 22, 1819, under the administration of President Monroe, done at Washington, D. C., between John Quincy Adams, secretary of state, on behalf of the United States, and Luis de Onís, Minister of Spain to the United States, on behalf of His Majesty Ferdinand VII., king of Spain. It secured to the United States the territory known as East and West Florida, now the present state of Florida, for the sum of \$5,000,000 in bonds similar to those issued for the Louisiana purchase, the interest on which to date of redemption being \$1,489,768, made the total cost \$6,489,768. This added to the public domain of the United States 59,268 square miles, or 37,931,520 acres, including certain grants.

§ 5. (3) *From Mexico*.—From Mexico, by treaty of Guadalupe Hidalgo, under the administration of President Polk, concluded February 2, 1848, by and between Nicholas P. Trist on behalf of the United States, and Luis G. Cuevas, Bernardo Couto, and Miguel Atristain on behalf of the republic of Mexico. This cession gave to the public domain of the United States the states of California, Nevada, and part of Colorado, also the lands in the territories of Utah, Arizona, and New Mexico, excepting in the last two the Mesilla valley, adding to the national domain approximately 522,568 square miles, or 334,443,520 acres. It cost (treaty stipulation) \$15,000,000.

§ 6. (4) *From Texas*.—From the state of Texas, by purchase, under the administration of President Fillmore. The United States, by act of congress of September 9, 1850, purchased from Texas her claim to certain public lands north of parallel 36° 30', and between that parallel and 32°, and lying west of the one hundred and third meridian, now included in Kansas, Colorado, New Mexico, and also the "public land strip." This cost \$16,000,000, in five per cent. bonds, interest and cash. The lands in this cession were estimated at 101,767 square miles, or 65,130,880 acres, and this was added to the public domain, being already, by annexation of Texas and the confirmatory clause of the treaty of Guadalupe Hidalgo, embraced within the national domain.

§ 7. (5) *From Mexico*.—From the republic of Mexico, by purchase, under the administration of President Pierce, known as the Gadsden purchase, under treaty made at the city of Mexico, December 30, 1853, by James Gadsden, United States minister, on behalf of the United States, and Manuel Díez de

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Bonilla, José Salazar Ylarregui, and J. Mariano Monterde on behalf of the republic of Mexico. In consideration of the concession by Mexico of the abrogation of sundry treaty stipulations in the treaty of Guadalupe Hidalgo, 1848, and the payment of the sum of \$10,000,000 by the United States to Mexico, a strip of land known as the Mesilla valley, and lying in the present territories of New Mexico and Arizona, on their southern border, was added to the national and public domain of the United States. It contained 45,535 square miles, or 29,142,400 acres. Cost, \$10,000,000. This territory now lies in New Mexico and Arizona; 14,000 square miles in New Mexico, and 31,535 square miles in Arizona.

§ 8. (6) *From Russia*.—All her possessions on the North American continent, including Alaska.

§ 9. *The Public Domain—Control and Disposition*.—The public domain embraces the area of the lands now owned or heretofore disposed of by the United States in nineteen states and eleven territories and parts of territories, and known as the "land states and territories," the United States being the sole owner of the soil, with entire and complete jurisdiction over the same. Article iv., section 3, paragraph 2, of the constitution of the United States provides, that "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This clause relates to property, and not to persons or communities. Mr. Madison introduced this clause in the constitutional convention. The original clause was: "Congress shall have power to dispose of the waste and unappropriated lands of the United States." This was referred to the committee of detail for revision and incorporation. Mr. Gouverneur Morris, of the committee, wrote the constitution from the convention notes. This committee changed "lands" into "territory and other property," and the right to "make all needful rules and regulations" was added, so that congress might protect and regulate all such property until disposed of. The supreme court of the United States, in *The United States v. Gratiot*, 14 Pet. 526, held, that "the term 'territory,' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' Congress has the same power over it as over any other property belonging to the United States. This power is vested in congress without limitation."

See *United States v. Railroad Bridge Co.*, 6 McLean, 517.

The United States, through congress, provides methods of

disposition of the public domain under grants, settlement laws, or sales, public or private; may prevent trespass, and in all methods retain the entire control over it until sold or otherwise disposed of. "Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring the public domain, or any part of it, and to designate the persons to whom the transfer shall be made."

For further authorities upon this subject, see the following decisions: *Gibson v. Chouteau*, 13 Wall. 92; *Irvine v. Marshall*, 20 How. 558; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *United States v. Gratiot*, 14 Pet. 526; *Russell v. Lovatte*, 21 Minn. 167; *Gill v. Halleck*, 33 Wis. 523; *Rose v. Buckland*, 17 Ill. 309; *Miller v. Little*, 47 Cal. 348; *Dyke v. McVey*, 16 Ill. 41; *Bagnell v. Broderick*, 13 Pet. 436; *Pollard v. Hagan*, 3 How. 212.

Change in political condition, as in a territory becoming a state, or change of boundary of a territory or state, in no wise affects the absolute and complete proprietary power of the national government over the public domain. It remains until the last acre is disposed of.

"No state formed out of the territory of the United States has a right to the public lands within its limits or can exercise any power whatever over them."

Turner v. Missionary Union, 5 McLean, 344; see also, *United States v. Gratiot*, 14 Pet. 526; *Bump's Notes of Constitutional Decisions*, title, Territories; *State v. Batchelder*, 5 Minn. 223.

The United States have surveyed to June 30, 1880, in the land states and territories, 752,557,195 acres of the public domain. There are remaining yet unsurveyed (estimated) 1,069,143,727 acres.

The surveyed lands yet undisposed of are estimated at 204,-802,711.12 acres, which with the unsurveyed make a grand total of 1,273,946,438.12 acres of land still the property of the United States and subject to disposition. Deducting (estimated) 110,-000,000 acres yet required to fill railroad grants, if roads as chartered and granted are completed, the actual area, still the property of the nation, is 1,163,946,438.12 acres. This includes the area of private land claims, patented and unpatented, estimated at 80,000,000 acres. This also includes the area of military and Indian reservations, estimated at 157,856,952.68 acres, of which probably more than 100,000,000 acres will revert to the public domain for future sale and disposition. It can be estimated that the total public domain to be disposed of will not

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vary much from 1,163,946,438.12 acres, equal to 7,274,665.24 homesteads of 160 acres each.

§ 10. *Surveyed and Unsold Lands.*—The surveyed and unsold lands lie in the following land states and territories (estimated):

In Iowa, Indiana, Illinois, and Ohio, practically none.

	Acres.
Minnesota.....	13,383,813.10
Kansas.....	28,049,731.54
Nebraska.....	23,958,652.59
California.....	25,250,680.47
Nevada.....	8,337,671.58
Oregon.....	12,906,700.66
Washington.....	9,088,338.93
Colorado.....	20,489,312.28
Utah.....	5,685,054.28
Arizona.....	1,561,231.13
New Mexico.....	6,042,409.46
Dakota.....	12,225,492.00
Idaho.....	3,925,237.16
Montana.....	5,779,452.42
Wyoming.....	5,645,121.75
Missouri.....	1,000,000.00
Wisconsin.....	5,440,338.19
Michigan.....	853,214.56
Total.....	189,622,455.12

This estimate is probably within twenty per cent. of the exact amount. Official causes prevent a closer estimate.

A large amount of the above-estimated vacant surveyed public lands may be at present occupied by settlers, or persons holding under the effect of the doctrine announced by the supreme court of the United States in *Atherton v. Fowler*, 6 Otto, 513; and *Hosmer v. Wallace*, 7 Id. 575. Neither the United States nor the local land officers have any official knowledge of the amount so occupied.

See chapters iv. and v., Public Sales and Private Entries.

In addition to the foregoing, there are vacant surveyed public lands in southern states, as follows:

	Acres.
Florida.....	3,205,109.00
Alabama.....	3,516,140.00
Mississippi.....	3,208,887.00
Arkansas.....	4,620,120.00
Louisiana.....	2,130,000.00
Total.....	16,680,256.00

Deducting lands that by reason of discrepancies
in records of local offices and general land office
are not actually known to be vacant, estimated
at not less than..... 1,500,000.00

Leaving a total of.....15,180,256.00
Add total of other states and territories, as above.189,622,455.12

Total surveyed and still to be disposed of...204,802,711.12

In the southern states, lands are all open to private entry, at the United States district land offices in the respective states, at \$1.25 per acre, except the "mineral tracts" lying in the Huntsville and Tuscaloosa districts in Alabama, under authority of an act of congress, July 4, 1876.

The total amount of land owned by the United States in the five southern states, surveyed and including 1,148,892 acres in Louisiana, and 7,756,493 acres in Florida, unsurveyed, is 25,585,641 acres.

§ 11. *Unsurveyed Lands.*—The unsurveyed lands lie and are in the following states and territories:

	Acres.
Minnesota.....	13,510,423
Nebraska.....	7,052,207
California.....	48,643,592
Nevada.....	58,436,598
Oregon.....	37,908,340
Washington.....	28,836,985
Colorado.....	40,657,67
Utah.....	44,282,680
Arizona.....	67,098,366
New Mexico.....	67,024,990
Dakota.....	71,422,103
Idaho.....	47,739,368
Montana.....	80,651,676
Wyoming.....	53,381,485
Louisiana.....	1,148,892
Florida.....	7,756,493
Indian Territory.....	17,150,250
Alaska.....	369,529,600
Public land strip.....	6,912,000

Total.....1,069,143,727

§ 12. *Receipts from and Cost of the Public Domain to June 30, 1880.*—The public lands of the United States, by sales for cash, fees, and commissions, have realized to the national govern-

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ment, since the passage of the ordinance of May 20, 1785, to June 30, 1880, a total net sum of \$200,702,849.11.

The public domain has cost in all a grand total of cash:

For purchases and cessions.....	\$88,157,389.98
For surveying and disposition (part estimated).	46,563,302.07
For Indian occupancy, title, etc.....	187,328,903.91

Total.....	\$322,049,595.96
------------	------------------

From the origin of the public domain to the thirtieth of June, 1880, the net cash receipts therefrom have been.....\$200,702,849.11

From the origin of the public domain to the thirtieth of June, 1880, the cash expenditures on account of the same have been..... 322,049,595.96

Deduct receipts from cost.....	\$121,346,746.85
--------------------------------	------------------

To June 30, 1880, the public domain has cost in cash \$121,-346,746.85 more than it has realized.

§ 13. *Receipts from Public Domain.*—About two hundred million acres of the public domain have been granted to railroad companies since 1850, enough to make several large states. These grants have been made principally for the purpose of developing the resources of the country, and facilitating communication between the Atlantic and Pacific oceans. They have already contributed much, and will in the future contribute more, toward the advancement of these desirable objects. The policy of making these extensive grants may be somewhat doubtful, and it seems clear that no more concessions of this character should be made, and that what remains of the public domain should be kept for the use of actual settlers thereon. In the past (with exception perhaps of these too extensive railroad grants), the public lands have been carefully and ably guarded by the officers of the government and by committees in the congress of the United States. While but little understood by the mass of the people, the wise men who have been at the head of affairs in our government since the acquisition of the public domain have looked upon it as one of the chief sources of national wealth and permanent empire, and have administered its affairs, not with the narrow view of realizing an immediate revenue, but with the comprehensive plan of providing homes for citizens to cultivate and improve; thus laying more broad and deep the foundations of a stable government, and an ever-increasing revenue.

CHAPTER II.

THE GENERAL LAND OFFICE.

- § 14. Importance and Functions of General Land Office.
- § 15. Registers and Receivers.
- § 16. Board of Equitable Adjudication.
- § 17. Indian Lands and Reservations.
- § 18. Rights between States and Settlers.
- § 19. The Secretary of the Interior.
- § 20. The Land Department.
- § 21. Pre-emption and Sale.
- § 22. Patents to Individuals.
- § 23. Indemnity to States.
- § 24. Recorder and Secretary.
- § 25. Effect of Listing to States.
- § 26. Duties of the President and Secretary.
- § 27. Public Lands Inclosed.

§ 14. *Importance and Functions of General Land Office.*—The commissioner of the general land office is attached to the department of the interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The act of April 25, 1812 (2 Stat. 716), establishing the general land office, put the office in the department of the treasury and placed the commissioner under the direction of the head of that department. The act of July 4, 1846 (5 Stat. 107), reorganizing the office, provided that the executive duties prescribed by law respecting the public lands should be subject to the supervision and control of the commissioner, under the direction of the president. But the office still continued a part of the department of the treasury; and as the president acts in matters belonging to the departments through their respective heads, the immediate supervision over and direction of the commissioner remained with the secretary after as previous to the reorganization. Such was the understanding and practice of the treasury department until the department of the interior was established, in 1849, when the land office was transferred to that department and its secretary was required to "perform all the duties of supervision and appeal" in relation to that

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office which had been previously discharged by the secretary of the treasury."

Opinion of Justice Field, *Patterson v. Tatum*, 3 Saw. 164.

There is no more responsible bureau of the government than that of the general land office. It holds the record of titles to the vast area known as the public domain, on which there are hundreds of thousands of homes. All the business pertaining to the survey, disposition, and patenting of the public lands of the United States is transacted through it, or under its order and supervision, giving employment on an average to two hundred clerks.

The laws and decisions of various states and territories have to be examined to determine who are the lawful wives, widows, heirs, devisees, executors, administrators, or guardians; to determine the jurisdiction of local courts, and the validity of proceedings therein, and the legality of judicial sales.

Important questions of law often arise in the various divisions of the office as to rules of evidence, as to boundaries, riparian rights, entries, locations, cultivation, improvements, settlement, domicile, expatriation, jurisdiction of executive officers; as to the authority of the office to set aside patents after execution, before delivery, and after delivery; as to right of way and water rights; as to when patents take effect; as to when patents are valid, void, or merely voidable; as to when legal title passes without patent; in construing foreign treaties and Indian treaties; as to forfeitures, abandonments, assignments; as to parties holding scrip, etc.

Public Domain, p. 166.

The secretary of the interior is charged by the statute with all business relating to public lands, including mines.

R. S. 441.

The commissioner of the general land office, like the secretary, is appointed by the president, and his business is under the direction of the secretary of the interior, to discharge all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the government.

R. S. 453.

§ 15. *Registers and Receivers.*—These officers are appointed by the president and belong to the executive department of the

government, and all their acts are subject to review by the commissioner and secretary of the interior. The offices were created and districts for the sale of lands made by act of May, 10, 1800. A land district for disposition of lands, with a register and receiver, may cover a state, or there may be ten in a state. Land districts are in no wise connected in boundary with surveying districts. They are made by law of congress (or by the president in mineral districts), and are abolished or consolidated one with another, reduced in area, or closed by congress or the president. They are simply points for sale and disposition of land more for the convenience of the people than of the government. The land being surveyed is duly returned, and notice of filing of plats given, and the land laws applicable to the district are put in force by the registers and receivers of the several district land offices in permitting the settlers and locators to proceed under the law.

Through the agency of these district offices, the United States proceeds to dispose of the public lands, in the methods contemplated in the laws providing for sales at ordinary private entry, for pre-emptions, for entries for homesteads, timber culture, town-site, and mining purposes; and in the laws making grants for specific objects, and exceptional provisions with regard to abandoned military and other reservations.

Public Domain, p. 171.

§ 16. *Board of Equitable Adjudication.*—The commissioner of the general land office, the secretary of the interior, and the attorney general constitute a "board of equitable adjudication," whose duty it is to prescribe regulations for the equitable decision of suspended entries of public lands, and of suspended settlers' claims, and adjudicate in what cases patents shall issue upon the same, and report such adjudication to congress.

R. S. 2450.

This is a tribunal of special and limited jurisdiction, but upon allegations of fraud, etc., it has the power to set aside an entry. When a case is properly presented, the board acquires exclusive jurisdiction, and the interior department and general land office lose all control over it, nor is there any appeal.

Conlin v. Yarwood, Copp's L. O., Jan. 1883, p. 188.

§ 17. *Indian Lands and Reservations.*—By section 2257, revised statutes, all lands belonging to the United States to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, re-

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strictions, and stipulations provided by law. The same right has been extended to homestead and other settlers upon public lands.

R. S. 2239.

The president can make military reservations, but he can not abolish them without an act of congress, as the act of June 12, 1858 (11 Stats. p. 336), interdicts the sale of any lands in such reservation without an act of congress. In regard to Indian reservations, he can not only create but abolish them without any express authority from congress.

Public Domain, pp. 243, 249.

§ 18. *Rights between States and Settlers.*—The eighth section of the act of congress of September 4, 1841, in authorizing the state to make selections of land, does not interfere with operations of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States are not in conflict with each other. Both are to have full operation; that one controlling in a particular case under which the first initiatory step was had.

And where a state seeks to select lands as a part of the grant aforesaid, and a settler seeks to acquire a right of pre-emption to the same lands, the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the initiatory act and cuts off all intervening claimants.

Shepley v. Cowan, 1 Otto, 330; Foley v. Harrison, 15 How. 433.

§ 19. *The Secretary of the Interior.*—The secretary of the interior has the power of supervision and appeal in all matters relating to the general land office, and that power is co-extensive with the authority of the commissioner to adjudge.

Maguire v. Tyler, 1 Black, 195.

§ 20. *The Land Department.*—Congress created the land department for the purpose of having the public lands surveyed and sold, and confided to the department as a special tribunal the authority to hear and determine certain matters arising in the course of its duties, and the decision of that tribunal within the scope of its authority is conclusive upon all others. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of

this power the final judgments of courts of law have been annulled or modified, the patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land department should constitute an exception to this principle.

Johnson v. Townley, 13 Wall. 72.

§ 21. *Pre-emption and Sale.*—Under the public land system, after surveys are made in any given locality, so that the different tracts can be identified by the descriptions used in these surveys, they are not subject to sale at private entry at the land office until there has been a public auction, at which the lands so surveyed are offered to the highest bidder.

The act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed but not open to private entry, as well as land that could be bought at private sale.

Johnson v. Townley, 13 Wall. 85.

§ 22. *Patents.*—It is the duty of the commissioner to issue patents for public lands and private land claims in all cases where the issue thereof is authorized by law.

2 Stat. 716; R. S. 453.

In the legislation of congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of claim of a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the same as justify its recognition and confirmation.

A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government. If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach to the title to the land segregated.

Langdean v. Haines, 21 Wall. 521.

A patent for public land issued by the land department, act-

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ing within the scope of its authority, and delivered to and accepted by the grantee, passes the legal title to the land. All control of the executive department of the government over the title thereafter ceases.

Moore v. Robbins, 6 Otto, 530.

But where a patent has been issued by the land department for land not subject to such disposal, or where the officers had no power to make such conveyance, the patent is absolutely void.

Sherman v. Buick, 3 Otto, 209.

A second patent may issue where the first is clearly erroneous.

Bell v. Hearne, 19 How. 253.

A patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation.

Hoofnagle v. Anderson, 7 Wheat. 214; Bagnall v. Broderick, 13 Pet. 436.

A court of equity will set aside a patent of the United States obtained by mistake, inadvertence, or fraud.

Hughes v. United States, 4 Wall. 232; United States v. Stone, 2 Id. 525.

A patent is a mere ministerial act, and if it be issued for lands reserved from sale by law, it is void.

Stoddard et al. v. Chambers, 2 How. 284.

Testimony, whether parol or documentary, which shows a want of power in the officers who issue a patent, is admissible in an action at law to defeat a title set up under it. In such case, the patent is not merely voidable, but absolutely void, and the party is not required to resort to a court of equity to have it so declared.

Sherman v. Buick, 3 Otto, 209.

And where there is a valid pre-emption claim on a school section at the time when the land is surveyed, the state has the right to select other lands.

Sherman v. Buick, 3 Otto, 209.

The power of congress in the disposal of the public domain can not be interfered with or its exercise embarrassed by any state legislation.

Gibson v. Chouteau, 13 Wall. 92.

The commissioner of the general land office can not properly

grant a patent under the seventh section of the act of July, 1866, "to quiet land titles in California," unless the purchaser bring himself by affirmative proofs within the terms of the section.

Secretary v. McGarrahan, 9 Wall. 298.

§ 23. *Indemnity to States.*—With the approval of the secretary of the interior, the commissioner may, upon satisfactory proof, allow indemnity to the several states for swamp and overflowed lands, granted to them by the act of September 28, 1850, and sold by the United States prior to March 3, 1857.

R. S. 2482.

Under this provision, a state is entitled to the purchase money of swamp lands within her limits, which were entered, with cash, prior to the passage of the act of March 3, 1857. She is also entitled to indemnity in land for such swamp lands as were located, with warrant or scrip, prior to the passage of that act.

11 Opinions Attorney General, 467.

In states and territories where there is no land office, entries of land may be made at the general land office.

19 Stat. 315; 20 Id. 201.

And when from any cause the office of surveyor general of any state or territory becomes vacant, or is abolished or discontinued, all matters in relation to the survey of lands in such state or territory shall be vested in the commissioner of the general land office.

10 Stat. 152.

§ 24. *Recorder and Secretary.*—There is in the general land office an officer called the recorder; whose duty it is to affix the seal of the office to all patents, and attend to the correct engrossing, recording, and transmission of such patents.

R. S. 259.

And the president is authorized to appoint a secretary, whose duty it is, under the direction of the president, to sign in his name, and for him, all patents for land sold or granted under the authority of the United States.

R. S. 450.

§ 25. *Effect of Listing to States.*—By section 2449 of the revised statutes, it is provided that where lands have been, or may hereafter be, granted by any law of congress to any one of the several states or territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the lists of such lands as have been, or may

hereafter be, certified by the commissioner of the general land office, under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby.

§ 26. *Duties of the President and Secretary.*—Though the grant of September 28, 1850, was a grant *in presenti* of swamp lands, yet the identification of them was a duty imposed on the secretary of the interior.

R. R. Co. v. Smith, 9 Wall. 95.

The act of March 3, 1857 (11 Stat.) confirmed to the several states their selections of swamp lands which had then been reported to the commissioner of the general land office so far as the land was then vacant and unappropriated.

Martin v. Marks, 7 Otto, 345.

By the third section of the fourth article of the constitution of the United States, congress is invested with exclusive and absolute power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Under the land system, congress makes the laws; the president executes them. The president can not order lands sold without the authority of congress. He is simply at the head of the executive department of the government.

Lands within the limits of the Pacific railroad and branches belonging to the government, in the even-numbered sections, were restricted to homestead and pre-emption entry by the act of March 6, 1868. Under the act of March 3, 1811, the vacant lands, generally in the Louisiana purchase, are subject to be proclaimed for sale by the president.

§ 27. *Public Lands Inclosed.*—An apparent obstruction to the free disposition of public lands has been raised quite recently by two decisions of the supreme court of the United States.

Atherton v. Fowler, 6 Otto, 513; Hosmer v. Wallace, 7 Id. 575.

The public land commission created by congress seem to think the effect of these decisions is that parties, whether qualified settlers or not, or whether desiring to acquire title or not, may take possession of and hold as squatters any quantity of the surveyed unoffered lands of the United States, to the exclusion of parties legally qualified who desire to take the benefit of the pre-

emption, homestead, and timber-culture acts, and they say that the government is powerless to enforce the settlement laws.

Public Domain, note bottom p. 15.

It would seem, however, that at least a partial remedy for this difficulty may be found in 2 Stat. 445, 448, 654, which, amongst other provisions, authorizes the president to direct the marshal, and if necessary to employ military force, to remove from public lands any person or persons who take possession of the same, or make or attempt to make a settlement thereon until thereunto authorized by law.

CHAPTER III.

SURVEYS AND SURVEYORS.

- § 28. Extension of Surveys.
- § 29. Rectangular System.
- § 30. Parallelograms.
- § 31. Duties of Surveyor General.
- § 32. Deposit of Money for Survey.
- § 33. Effect of Calls, Courses, and Distances.

§ 28. *Extension of Surveys.*—The cessions of territory by the several states were organized from time to time into geographical divisions by the laws creating them, and the lands were ordered to be surveyed, including lands to which the Indian title had been or would be extinguished. The same proceeding took place with purchased territory in 1803, 1819, 1848, 1850, and 1853.

The extension of the surveys being authorized by congress over a district of country, the commissioner of the general land office directs the surveyor general of the district, whose office is created by the law prior to extending the surveys, to begin the same.

§ 29. *Rectangular System.*—The land surveys under the United States are uniform, and done under what is known as the "rectangular system." This system of surveys was reported from a committee of congress, May 7, 1784. The committee consisted of Thomas Jefferson, chairman, Messrs. Williamson, Howell, Gerry, and Reas. Its origin is not known, beyond the committee's report.

The act of cession of the state of Virginia, of her western territory, provided for the formation of states from the same not less than one hundred nor more than one hundred and fifty miles square.

This square form of states may have influenced Mr. Jefferson in favor of a square form of survey, and besides, the even surface of the country was known, the lack of mountains and the prevalence of trees for marking it also favoring a latitudinal and longitudinal system. Certain east and west lines run with the parallels of latitude, and the north and south township lines with the meridians.

The system, as adopted, provided for sale in sections of 640 acres, one mile square. In 1820, a quarter-section, or 160 acres, could be purchased. In 1832, subdivisions were ordered by law into 40-acre tracts, or quarter quarter-sections, to settlers, and in 1846, to all purchasers.

Since the adoption of the rectangular system of public surveys, May 20, 1785, twenty-four initial points, or the intersection of the principal bases with surveying meridians, have been brought into requisition to secure certainty and brevity of description in the transfer of public lands to individual ownership. From the principal bases, townships of six miles square are run out and established, with regular series of numbers counting north and south thereof, and from the surveying meridians a like series of ranges are numbered, both east and west of the principal meridians.

This system of survey and description is one of great simplicity; and its adoption has been of incalculable benefit to the vast area of country over which it has been extended.

By sections 2409 and 2410, revised statutes, the secretary of the interior is authorized in his discretion to direct a departure from the rectangular mode of survey in California and Oregon.

The rectangular system requires that the meridional lines shall be run on the true meridians (R. S. 2395); therefore, in order to counteract the error that would otherwise result from the convergency of meridians as they run to the north pole, and also to check errors arising from inaccuracies in measurements on meridian lines, *standard parallels* or *correction lines* are run and marked at every four townships or twenty-four miles north of the base, and at every five townships or thirty miles south of the same.

But in California, probably through a mistake or blunder of the first surveyor in that state, these parallels or correction lines are run and marked at every five townships or thirty miles north of the base, and at every four townships or twenty-four miles south of the same. "Guide meridians" are next surveyed at intervals of eight ranges or forty-eight miles east and west of the principal meridian, starting north of the base in the first instance from that line and closing on the first standard north, then starting from the first standard and closing on the second standard north, and so on. South of the base line, the guide meridians start from the first standard south, and close on the base line; then starting from the second standard, and closing on the first standard; and again starting from the third standard, and closing on the second, and so on. The closing corners on

the base line and standard parallels are established at the intersection of the meridional lines therewith, thus, owing to the convergency of meridians, occasioning a double set of corners on those lines which are designated as "standard corners" and "closing corners."

The parallelograms formed by the base line, principal meridian, standard parallels, and guide meridians, twenty-four by forty-eight miles in extent *north* of the base line and thirty by forty-eight miles *south* of the base line, constitute the frame work of the rectangular system of surveys, except in the state of California, as above mentioned.

§ 30. *Parallelograms*.—These parallelograms are each subdivided into townships six miles square, containing as near as may be 23,040 acres, and again each township is subdivided into thirty-six sections of one mile square, containing, as near as practicable, 640 acres each. The sections of one mile square are the smallest tracts, the out-boundaries of which the law requires to be actually surveyed.

The minor subdivisions are defined by law, and the surveyors general, in protracting township plats from the field-notes of sections, designate them in red ink, the lines being imaginary, connecting opposite quarter-section corners, thereby dividing the section into four quarter-sections of 160 acres, and these in their turn into quarter quarter-sections of 40 acres each, by imaginary lines starting from points equidistant from the section and quarter-section corners, and running to opposite corresponding points. These imaginary lines may at any time be actually surveyed by the county surveyor, at the expense of the settler.

A tier of townships running north and south is called a range, and each range is numbered as it is east or west of the principal meridian. Each township is also numbered as it is north or south of the base line.

Township, sectional, or mile corners are perpetuated by planting a post at the place of the corner, to be formed of the most durable wood of the forest at hand, said posts to be four inches square, two feet deep, and two feet above the ground. They are marked above the ground with appropriate marking irons, the marks indicating for what they stand, and the mark always *faces* toward the township indicated. The marks are required to be one eighth of an inch deep, and the surveyor is required to apply to them all a streak of red chalk.

Section or mile posts, being corners of sections where such are common to four sections, are to be set *diagonally* in the

earth (in the manner provided for township corner posts), and on each side of the squared surfaces is to be marked the appropriate number of the particular one of the *four* sections respectively which such side *faces*; also on one side thereof are to be marked the number of its township and range.

In every township subdivided into thirty-six sections, there are twenty-five interior section corners, each of which will be common to four sections.

A quarter-section or half-mile post has no other mark on it than " $\frac{1}{4}$ S," to indicate what it stands for.

Township corner posts common to four townships are notched with six notches on each of the four angles of the squared part set to the cardinal points.

All mile posts on *township lines* have as many notches on them on two opposite *angles* thereof, as they are miles distant from the township corners respectively.

Each of the posts at the corners of sections in the *interior* of a township must indicate, by a number of notches on each of its four corners directed to the cardinal points, the corresponding number of miles, that it stands from the outlines of the township. The four sides of the post will indicate the number of the section they respectively *face*.

Should a tree be found at the place of any corner, it will be marked and notched as aforesaid, and answer for the corner in lieu of a post; the kind of tree and its diameter being given in the field-notes. Rocks and mounds are sometimes marked as corners.

The lines of public surveys over level ground are measured with a four-pole chain 66 feet in length; eighty chains constituting one lineal mile; but with a two-pole chain where the features of the country are broken and hilly.

§ 31. *Duties of Surveyor General.*—A surveyor general is appointed by the president for each of the following-named states and territories: Louisiana, Florida, Minnesota, Kansas, California, Nevada, Oregon, Nebraska and Iowa, Dakota, Colorado, New Mexico, Idaho, Washington, Montana, Utah, Wyoming, Arizona; Nebraska and Iowa embracing but one surveying district.

R. S. 2207.

The surveyor general, while in the discharge of the duties of his office, must reside in the district for which he is appointed.

R. S. 2414.

And the president is authorized, in any case where he thinks the public interests require it, to transfer the duties of register

and receiver in any district to the surveyor general of the surveying district in which such land district is located.

R. S. 2228.

Each surveyor general must prepare or cause to be prepared a plat and field-notes of all mining surveys made by authority of law, which must show accurately the boundaries of such claims; and when warranted by the facts, he must give to the claimant his certificate that five hundred dollars' worth of labor has been expended or improvements made upon the claim by the claimant or his grantors, and that the plat is correct, with such further description by reference to natural objects or permanent monuments as shall identify the claim and furnish an accurate description to be incorporated in the patent.

R. S. 2325.

Section 2447, revised statutes, requires the surveyors general, when duly authorized by law, to cause all confirmed private land claims within their districts to be accurately surveyed.

A surveyor general has the power to engage a sufficient number of skillful surveyors as his deputies, to whom he is authorized to administer the necessary oaths upon their appointment, and may remove them for negligence or misconduct in office.

And he must cause to be surveyed, measured, and marked without delay all base and meridian lines through such points and perpetuated by such monuments, and such other correctional parallels and meridians as may be prescribed by law or by instructions from the general land office, in respect to the public lands within his surveying district to which the Indian title has been or may be hereafter extinguished.

It is made his duty to transmit to the register of the respective land offices within his district general and particular plats of all lands surveyed by him for each land district; and to forward copies of such plats to the commissioner of the general land office.

R. S. 2223.

§ 32. *Deposit of Money for Survey.*—When the settlers in any township, not mineral or reserved by the government, desire a survey made of the same under the authority of the surveyor general, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it is lawful for the surveyor general, under such instructions as may be given him by the commis-

sioner of the general land office, and in accordance with law, to survey such township, and make return thereof to the general and proper local land office, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys.

R. S. 2401.

The deposit of money in a proper United States depository, under the provisions of the preceding section, will be deemed an appropriation of the sums so deposited, for the objects contemplated by that section, and the secretary of the treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service; but any excesses in such sums over and above the actual cost of the surveys, comprising all expenses incident thereto, for which they were severally deposited, shall be repaid to the depositors respectively.

R. S. 2402.

Where settlers make deposits in accordance with the provisions of section 2401, above mentioned, the amount so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits; or the certificates issued for such deposits may be assigned by indorsement and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise.

R. S. 2403.

§ 33. *Calls, Courses, and Distances.*—Where nothing exists to control the call for course and distance the land must be bounded by the courses and distances of the patent according to the magnetic variation.

McIvers v. Walker, 9 Cranch, 173.

An error in description is not fatal in an entry if it does not mislead a subsequent locator. "About north" means north.

Shipp v. Miller's Heirs, 2 Wheat. 316.

In the case of *Boadley v. Taylor*, 5 Cranch, 191, Chief Justice Marshall says that, according to a uniform course of decisions in the state of Kentucky, the rule was established that one call in an entry or survey which is either impossible or uncertain should be disregarded, and the entry supported if there be other calls which are sufficiently certain. The same principle is asserted in *Holmes v. Trout*, 7 Pet. 171.

CHAPTER IV.

PUBLIC SALES AND PRIVATE ENTRIES.

- § 34. The Different Modes of Obtaining Title to Public Lands—Public Sales; Private Entries.
- § 35. In the Louisiana Purchase.
- § 36. In California.
- § 37. Beds of Navigable Lakes.

§ 34. *The Different Modes of Obtaining Title to Public Lands.*
There are not less than ten different modes of obtaining title to public lands:

1. Through direct grants by congress, which include railroad grants and grants to states.
2. By public sales.
3. By private entry.
4. By pre-emption.
5. By homestead entry.
6. Under the timber-culture act.
7. Under the town-site and county-seat act.
8. Under the act relative to bounty land warrants.
9. Under the laws relating to mineral lands.
10. Under the desert-land act.
11. Under acts and treaties in relation to private land claims.

The last, though it is not, strictly speaking, a method of obtaining title to public lands, is still a mode by which a patent from the government may be obtained.

And first, of public sales and private entries. Congress, by the third section of the act of June 15, 1880 (section 42), reduced the price of land within railroad limits then subject to entry (meaning in this connection ordinary cash entry of offered lands), which were put in market at \$2.50 prior to the first of January, 1861, to \$1.25 per acre. Title to these lands may be acquired by purchase at public sale or by ordinary private entry, and in virtue of the pre-emption, homestead, timber-culture, and other laws.

One and the same individual may take up lands under the pre-emption, homestead, and timber-culture laws, and if there is adjacent land not susceptible of cultivation without irrigation, under the desert-land act also, thus obtaining more than

one thousand acres; and he may still purchase as much more as he desires at public sales and private entries.

Purchase at Public Sale.—This may be done where lands are offered at public auction to the highest bidder, either pursuant to proclamation by the president or public notice given in accordance with directions from the general land office.

By Private Entry, or Location.—The lands liable to disposal in this manner are those which have been offered at public sale, which were not then sold, and which have not since been reserved or otherwise withdrawn from market. In this class of offered and unreserved lands, the following steps may be taken to acquire title: The applicant will first present a written application to the register for the district in which the land is situated, describing the tract he wishes to purchase, and giving its area. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of the purchase money.

The receiver will then issue his receipt for the money paid in duplicate, giving to the purchaser a duplicate receipt. The register will issue his certificate of purchase. At the close of the month the register and receiver will make returns of the sale to the general land office, from which, when the proceedings are found regular, a patent or complete title will be issued, and on surrender of the duplicate receipt such patent will be delivered at the option of the patentee, either by the commissioner at Washington or by the register at the district land office.

§ 35. *The Louisiana Purchase.*—The act of March 3, 1811 (2 Stat., sec. 4, p. 663), authorizes and directs patents to be issued for lands sold by the United States at public sale and private cash entry in the Louisiana purchase now constituting the public land states and territories of Arkansas, Missouri, Iowa, Kansas except a fraction, Nebraska, Dakota, Montana, Idaho, Oregon, Washington, parts of Minnesota, Colorado, and Wyoming, in the same manner and on the same terms as is or may be provided by law for lands sold in the state of Ohio; and the provision of law at that time with reference to Ohio was, that on presentation of the proper certificate of purchase, "the President of the United States is hereby authorized to grant a patent for lands thus sold to the purchaser, his heirs or assigns."

1 Stat., sec. 7, p. 469; 2 Id., sec. 7, p. 76.

Although not embraced in the revised statutes, these provisions have never been repealed or modified.

Vide Repeal Provisions, sec. 5596, R. S.

§ 36. *In California.*—The act of March 3, 1853, sec. 6 (10 U. S. Stat., p. 346), provides that surveyed lands shall be offered for sale under the land rules and regulations now governing such sales, or such as may be hereafter prescribed, and that all of said lands that shall remain unsold after having been proclaimed and offered shall be subject to entry at private sale as other public lands.

For the state of Nevada and the territories of Arizona, New Mexico, and Utah, and such portions of Kansas, Colorado, and Wyoming as embrace territory ceded by Mexico, the authority for the issue of patents for lands sold at public or private entry is derived from the general provisions of the statutes extending the land system and laws of the United States and territories.

§ 37. *Beds of Navigable Lakes.*—In the case of the claims of the Illinois Central Railroad Company, state of Illinois, county of Cook, and others, for lands in Illinois known as the bed of Wolf lake, it was decided that neither the railroad company, nor the state, nor the claims of riparian owners, nor the scrip locators, nor the city of Chicago, was entitled to the land; but that it belonged to the government, and it was awarded to such pre-emption and homestead claimants as showed priority of right.

The testimony showed that the bed of the lake was covered with water at the date of the grant to the railroad company, September 20, 1850. The department holds that the land was not in existence at the date of the grant, and that the grant being a grant *in præsentî*, under the decision in the case of Leavenworth, L. & G. R. R. v. United States, 2 Otto, 741, there was nothing in the bed of the lake to which it could attach at that time, and that the grant indicates no purpose to give in future. The state made a swamp-land claim, which embraced all the lands in controversy.

It was rejected on the ground that the swamp-land grant was a grant *in præsentî*, and there was a failure to establish the swampy character of the land in 1850, the date of the grant.

Copp's L. L., 1882, p. 311.

The rule, however, would have been otherwise if the land had been covered by the waters of a lake not navigable.

See chapter on General Grants to States.

Lands which are marked on the books of the local office as covered by claims which are finally determined to be absolutely void from their inception, are withdrawn from market, and can not be again subject to private entry until duly offered at public sale.

Copp's L. L., 1882, p. 305.

After lands have been offered at public sale and then withdrawn, they may be restored to homestead and pre-emption entry. Until they have been again offered at public sale, they are not subject to private entry.

Copp's L. L., 1882, p. 307.

Assignments of duplicate cash receipts must be witnessed, and in case of married men the dower right must be assigned by their wives.

Copp's L. L., 1882, p. 310.

CHAPTER V. PUBLIC SALES AND PRIVATE ENTRIES.

STATUTE LAW.

- § 38. Public Sale of Lands in Half Quarter-sections.
- § 39. Advertisement of Sales.
- § 40. Price of Lands, \$1.25 per Acre.
- § 41. No Credit on Sales of Public Lands.
- § 42. Lands Raised to \$2.50 per Acre Prior to January, 1861, Reduced to \$1.25 per Acre.
- § 43. Public Lands may be Offered for Sale in Such Proportions as the President Chooses.
- § 44. Duration of Sales.
- § 45. Several Certificates Issued to Two or More Purchasers of Same Section.
- § 46. Private Sales, in what Bodies.
- § 47. Private Sales, Proceedings in.
- § 48. Highest Bidder, when Preferred in Private Sales.
- § 49. Minimum Price, how Fixed when Reservations are Sold.
- § 50. Lands in California Subject to Private Entry and Withdrawn, how to be Opened to Entry.
- § 51. What Coins Receivable in Payment for Public Lands.
- § 52. Mistakes in Entry of Lands, Provisions for.
- § 53. Mistakes in Patents for Lands.
- § 54. Mistakes in Location of Warrants.
- § 55. Error in Entry by Mistake of Numbers, Proceedings upon.
- § 56. Agreement and Acts Intended to Prevent Bids; Penalty.
- § 57. Agreement to Pay Premiums to Purchasers at Public Sales.
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§ 38. *Public Sale of Lands in Half Quarter-sections.*—All the public lands, the sale of which is authorized by law, shall, when offered at public sale to the highest bidder, be offered in half quarter-sections.

3 Stat. 566; R. S. 2353.

§ 39. *Advertisement of Sales.*—The public lands which are exposed to public sale by order of the president shall be advertised in one newspaper published in the state or territory where the lands are situated, to be designated by the secretary of the interior, for a period of not less than three nor more

than six months prior to the day of sale, unless otherwise specially provided.

4 Stat. 702; 19 Id. 221, 377; R. S. 2359.

§ 40. *Price of Lands, \$1.25 per Acre.*—The price at which the public lands are offered for sale shall be \$1.25 an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than \$1.25 an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at \$1.25 an acre, to be paid at the time of making such entry; provided, that the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of congress, shall be \$2.50 per acre.

3 Stat. 566; 19 Id. 377; R. S. 2357.

§ 41. *No Credit on Sales of Public Lands.*—Credit shall not be allowed for the purchase money on the sale of any of the public lands, but every purchaser of land sold at public sale shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he enters the same at the land office; and if any person, being the highest bidder at public sale for a tract of land, fails to make payment therefor on the day on which the same was purchased, the tract shall be again offered at public sale on the next day of sale, and such person shall not be capable of becoming the purchaser of that or any other tract offered at such public sales.

3 Stat. 566; R. S. 2356.

§ 42. *Lands Raised to \$2.50 per Acre Prior to January, 1861, Reduced to \$1.25 per Acre.*—The price of lands now subject to entry which were raised to \$2.50 per acre, and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to \$1.25 per acre.

Act of June 15, 1880; Cir. G. L. O., July 17, 1860.

§ 43. *Public Lands may be Offered for Sale in such Proportions as the President Chooses.*—Whenever the president is authorized to cause the public lands in any land district to be

offered for sale, he may offer for sale, at first, only a part of the lands contained in such district, and at any subsequent time or times he may offer for sale in the same manner any other part, or the remainder of the lands contained in the same.

2 Stat. 479; 19 Id. 221, 377; R. S. 2358.

§ 44. *Duration of Sales.*—The public sales of lands shall, respectively, be kept open for two weeks, and no longer, unless otherwise specially provided by law.

3 Stat. 567; R. S. 2360.

§ 45. *Several Certificates Issued to Two or More Purchasers of Same Section.*—Where two or more persons have become purchasers of a section or fractional section, the register of the land office of the district in which the lands lie shall, on application of the parties, and a surrender of the original certificate, issue separate certificates, of the same date with the original, to each of the purchasers, or their assignees, in conformity with the division agreed on by them; but in no case shall the fractions so purchased be divided by other than north and south, or east and west, lines; nor shall any certificate issue for less than eighty acres.

4 Stat. 287; R. S. 2361.

§ 46. *Private Sales, in what Bodies.*—All the public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections.

4 Stat. 503; R. S. 2354.

§ 47. *Private Sales, Proceedings in.*—Every person making application at any of the land offices of the United States for the purchase at private sale of a tract of land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half quarter-section, or quarter quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.

2 Stat. 556; R. S. 2355.

§ 48. *Highest Bidder, when Preferred in Private Sales.*—Where two or more persons apply for the purchase, at private sale, of the same tract, at the same time, the register shall determine the preference, by forthwith offering the tract to the highest bidder.

3 Stat. 567; R. S. 2365.

§ 49. *Minimum Price, how Fixed when Reservations Sold.*—Whenever any reservation of public lands is brought into market, the commissioner of the general land office shall fix a minimum price, not less than \$1.25 per acre, below which such lands shall not be disposed of.

13 Stat. 374; R. S. 2384.

§ 50. *Lands in California Subject to Private Entry and Withdrawn, how to be Opened to Entry.*—Wherever lands in California subject to private entry have been or are hereafter withdrawn from market for any cause, such lands shall not thereafter be held subject to private entry until they have first been open for at least ninety days to homestead and pre-emption settlers, and again offered at public sale.

16 Stat. 304; 18 Id. 497; R. S. 2367.

§ 51. *What Coins Receivable in Payment for Public Lands.*—The gold coins of Great Britain and other foreign coins shall be received in all payments on account of public lands, at the value estimated annually by the director of the mint, and proclaimed by the secretary of the treasury, in accordance with the provisions of section 3564 of the revised statutes, title, The Coinage.

3 Stat. 779; 11 Id. 163; R. S. 2366.

§ 52. *Mistakes in Entry of Lands, Provisions for.*—In every case of a purchaser of public lands, at private sale, having entered at the land office a tract different from that he intended to purchase, and being desirous of having the error in his entry corrected, he shall make his application for that purpose to the register of the land office; and if it appears from testimony satisfactory to the register and receiver, that an error in the entry has been made, and that the same was occasioned by original incorrect marks made by the surveyor, or by the obliteration or change of the original marks and numbers at corners of the tract of land, or that it has in any other wise arisen from mistake or error of the surveyor, or officers of the land office, the register and receiver shall report the case, with the testimony, and their opinion thereon, to the secretary of the interior, who is authorized to direct that the purchaser is at liberty to withdraw the entry so erroneously made, and that the moneys which have been paid shall be applied in the purchase of other lands in the same district, or credited in the payment for other lands which have been purchased at the same office.

3 Stat. 526; R. St. 2369.

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§ 53. *Mistakes in Patents for Lands.*—The provisions of the preceding section are declared to extend to all cases where patents have issued or may hereafter issue; upon condition, however, that the party concerned surrenders his patent to the commissioner of the general land office, with a relinquishment of title thereon, executed in a form to be prescribed by the secretary of the interior.

4 Stat. 301; R. S. 2370.

§ 54. *Mistakes in Location of Warrants.*—The provisions of the two preceding sections are made applicable in all respects to errors in the location of land warrants.

10 Stat. 257; R. S. 2371.

§ 55. *Error in Entry by Mistake of Numbers; Proceedings upon.*—In all cases of an entry hereafter made, of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, where the tract, thus erroneously entered, does not, in quantity, exceed one half-section, and where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or, in case of his death, the legal representatives, not being assignees or transferees, may, in any case coming within the provisions of this section, file his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, with the register and receiver of the land district within which such tract of land is situated, who shall transmit the evidence submitted to them in each case, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to the commissioner of the general land office, who, if he be entirely satisfied that the mistake has been made, and that every reasonable precaution and exertion had been made to avoid it, is authorized to change the entry, and transfer the payment from the tract erroneously entered to that intended to be entered, if unsold; but if sold, to any other tract liable to entry; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry; nor shall anything herein contained affect the right of third persons.

4 Stat. 31; R. S. 2372.

§ 56. *Agreement and Acts Intended to Prevent Bids; Penalty.*—

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree, with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one \$1,000, or imprisonment not more than two years, or both.

4 Stat. 392; R. S. 2373.

§ 57. *Agreements to Pay Premiums to Purchasers at Public Sales.*—If any person before or at the time of the public sale of any of the lands of the United States, enters into any contract, bargain, agreement, or secret understanding with any other person, proposing to purchase such land, to pay or give to such purchasers for such land a sum of money or other article of property over and above the price at which the land is bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void.

4 Stat. 392; R. S. 2374.

§ 58. *Recovery of Premiums Paid to Purchasers at Public Sales.*—Every person being a party to such contract, bargain, agreement, or secret understanding, who pays to such purchaser any sum of money or other article of value, over and above the purchase money of such land, may sue for and recover such excess from such purchaser in any court having jurisdiction of the same.

4 Stat. 392; R. S. 2375.

§ 59. *Discovery of Agreements to Pay Premium, by Bill in Equity.*—If the party aggrieved have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same; but every such suit either in law or equity shall be commenced within six years next after the sale of such land by the United States.

4 Stat. 392; R. S. 2376.

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§ 60. *Limitation of Entries by Agricultural College Scrip.*—In no case shall more than three sections of public lands be entered at private entry in any one township by scrip issued to any state under the act approved July 2, 1862, for the establishment of an agricultural college therein.

15 Stat. 227; R. S. 2377.

§ 61. *Sale of Saline Lands.*—Whenever it shall be shown to the satisfaction of the commissioner of the general land office, by testimony taken before the register and receiver in any land district, that any of the lands within their district are saline in character, and not subject to sale under the general land laws, such lands shall be offered for sale at public auction at the local land office of the district in which they are situated, under regulations to be prescribed by the commissioner, and sold to the highest bidder for cash, at a price not less than \$1.25 per acre; and in case said lands are not sold when so offered, they shall be subject to private sale at such land office, for cash, at a price not less than \$1.25 per acre, in the same manner as other public lands of the United States are sold; *provided*, that this section shall not apply to any state or territory to which a grant of salines has not been made by Congress, nor to any state or territory to which such a grant has been made but which remains unsatisfied; and the patents issued for said lands shall be in the form of, and shall only operate as, a release and quitclaim of such title as the United States has in such lands.

19 Stat. 221.

CHAPTER VI. HOMESTEADS.

- § 62. General Sketch.
- § 63. What Lands Subject to Homestead Laws.
- § 64. Railroad Grants.
- § 65. Lands at Private Entry.
- § 66. What are Mineral Lands.
- § 67. Mexican Lands.
- § 68. Who may Enter.
- § 69. Rights of Married Women.
- § 70. When a Homestead Right is Assignable.
- § 71. Rights of Heirs.
- § 75. Fees in Land Offices.
- § 76. Directions how to Proceed.

§ 62. *General Sketch.*—The homestead question, or the granting of free homes from and on the public domain, became a national question in 1852. In that year the free-soil national democratic convention, by one of the resolutions in its platform, adopted and strongly urged the passage of such a law. Thenceforward it was in the platform of political parties, and was freely discussed both in private circles and upon the rostrum.

Several homestead bills were at different times introduced in congress, and in 1860 one of them passed both houses, but was vetoed by President Buchanan. In 1862 another bill passed congress, which was on the twentieth day of May of that year approved by Abraham Lincoln. This act has since been several times amended. The present homestead law contains all the beneficial features of the pre-emption act, with the additions suggested by experience and the changed conditions of national life. It contains one feature as broad in its terms and as beneficial in its principle as the domain it covers. It is as follows:

“No land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.”

Previous to 1862 pre-emption was the only mode of acquiring title, but the homestead act is now the approved and preferred method of obtaining title to the public lands. For this reason, and the further reason that the same rules of practice (except-

ing statutory rules) which control under the homestead laws prevail also under all the different forms or modes of acquiring title to public lands, the homestead laws will be first considered.

§ 63. *What Lands Subject to Homestead Laws.*—All lands belonging to the United States to which the Indian title has been or may hereafter be extinguished—excepting: 1. Lands included in any reservation, by any treaty, law, or proclamation of the president for any purpose; 2. Lands included within the limits of any incorporated town, or selected as the site of any city or town; 3. Land actually settled upon and occupied for purpose of trade or business, and not for agriculture; and, 4. Land on which are situated any known salines or mines—are subject both to the pre-emption and homestead laws, under the conditions, restrictions, and stipulations provided by law.

R. S. 2257, 2258, 2259.

But an entry under these laws can not be made of land unfit for cultivation.

Copp's L. L., vol. 1, p. 116.

§ 64. *Railroad Grants.*—Congress has adopted the policy of keeping the public lands open to occupation and appropriation by settlers, notwithstanding they may possibly fall within the limits of a railroad grant, when the final and definite route of the road is surveyed.

19 Stat. 35; Railroad Co. v. Baldwin, 13 Otto, 436.

By the act of April 21, 1876, "homestead entries within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated," will be confirmed, if all the proceedings on the part of the settler are regular.

And by the act of March 3, 1879, all the even sections within any land grant to railroads, whether they have been previously withdrawn by the president or not, are opened to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler.

School lands are open until a survey in the field.

The swamp-land grant is a grant *in præsentia*; and if the lands were swamp at the date of the grant, they belong to the state. This question is frequently tried in the courts.

Valid pre-emption and homestead entries are usually reserved

in railroad grants, and the supreme court of the United States, in the case of *R. R. Co. v. United States*, 2 Otto, 733, holds that reserved lands are absolutely and unconditionally excepted from these grants.

All grants across the continent are grants *in præsenti*; but prior to the definite location of the line of the roads they do not prevent settlers' rights from attaching to the land, unless there is either a legislative or executive withdrawal of the particular tract sought to be entered; and the president can not withdraw land opened to settlement by act of congress.

See title, Railroad Grants.

§ 65. *Lands at Private Entry*.—Lands once offered at \$2.50 per acre, but reduced in price to \$1.25, though subject to entry by settlers, are not subject to private entry until reoffered at the reduced rates.

Letter of Acting Secretary Josselyn, Copp's L. O., Dec. 1882.

§ 66. *What are Mineral Lands*.—Lands valuable for minerals, such as slate, fire-clay, borax, mica, umber, petroleum, coal, salt springs and salines, diamonds, gold, silver, cinnabar, lead, tin, and copper, whether in place or places, are exempt from the operation of the homestead laws.

R. S. 2318; *Morton v. Nebraska*, 21 Wall. 660; Opinion Attorney General, August 31, 1872. As to lime and gypsum, see title, Timberculture and Stone Act.

§ 67. *Mexican Lands*.—Mexican grants are by treaties protected from sale or disposition by the United States to any other than the Mexican grantees or their heirs or assigns, and the lands within their exterior limits prior to survey are not open to homestead entries, and no land inside of a confirmed survey can ever be opened to such entry.

§ 68. *What Persons may Enter*.—Every person who is at the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, is entitled to enter one quarter-section. This includes all single women who are citizens and over twenty-one years of age.

R. S. 2289.

§ 69. *Married Women and their Rights*.—In case a single woman marries after entry of land, and dies before issuance of patent, if the law has been complied with, and there are no heirs or distributees except the husband, the patent will be issued to her as Mary Doe, formerly Mary Roe. A woman di-

vorced from her husband is, in the administration of the homestead law, entitled to no rights acquired during coverture by the husband; and if there be an infant child living at the time of the homesteader's death, the right and fee will inure to the benefit of the child, notwithstanding a will devising the land to other parties.

Copp's L. L., pp. 443, 446.

When the child of a deceased soldier is a married woman under the age of 21 years, she is a soldier's orphan, and may make entry, and where a woman holds a homestead of 80 acres and afterward marries, it has been held that she is entitled to an additional entry under the act of March 3, 1879.

Copp's L. L., 1882, p. 468; Copp's L. O., vol. 6, pp. 103, 190; Id. vol. 7, p. 148; Id. vol. 8, p. 121.

When a single woman makes a homestead entry and afterwards marries, her husband in the event of her death can not purchase in his own name, but the patent may issue to the heirs of his wife.

Letter of Commissioner McFarland, Copp's L. O., Jan. 1883, p. 196.

A homestead party can not by his or her will defeat the law which provides that in case of the death of both father and mother, leaving minor children, the home rights shall inure to the benefit of such children.

Copp's L. O., April, 1882, p. 6.

A wife can not claim settlement during coverture; and abandonment of an entry by a husband is abandonment by the wife; but a deserted wife may purchase under the act of June 15, 1880, the land embraced in her husband's homestead entry, notwithstanding a contest initiated several months after she had left the land.

Copp's L. O., Aug. 1882, p. 97; Id., Sept. 1882, p. 116.

It has been held, that where a husband and wife have resided upon public land for more than five years, and the husband dies without having made entry of the land, the wife can receive no benefit from the fact of such residence, but she will be entitled to make an original entry for herself. If the husband, while living, has made entry, she is entitled to credit for residence in making final proof back to the date of settlement.

Copp's L. O., vol. 8, p. 175.

A polygamous wife can not enter if she allows her pretended husband to control her acts, and maintains marital relations

with him, because the law requires that the entry must be made for the exclusive use and benefit of the applicant.

Copp's L. O., vol. 6, p. 107.

It is probable that the first wife of a polygamist, who does not maintain marital relations with her husband, who supports herself, and is not controlled by him, and is in other respects qualified, may enter lands, provided her marriage contract was entered into under the rules, customs, and laws of the Mormon church sanctioning polygamy. Such a contract is not surrounded by the conditions required to constitute marriage in any civilized country. It is against public policy, and impregnated with a vice that can not be eradicated, to wit: the contract itself carries with it a consent on the part of the wife that the husband may take and live with other women as his wives. I am not aware that the question has ever been raised, but it seems to me probable that even the first marriage may be declared void.

§ 70. *When a Homestead Right is Assignable.*—The supreme court of the United States at the October term, 1879, in the case of Hall et al. v. Russell et al., held, that where a settler upon public land dies before he has complied with the law in reference to residence and cultivation, he has no devisable estate, and the children take nothing by virtue of his entry. Heirs of a deceased settler do not take their rights by descent, but as donees of the government.

101 U. S. 503. *Under Oregon Donation Act*

§ 71. *Rights of Heirs.*—A woman may consummate her deceased husband's entry and receive a patent in her own name, and afterwards may make another homestead entry in her own right.

Decision of secretary, Copp's L. L., 1882, p. 442.

§ 72. Prior to the act of May 14, 1880, no homestead rights could be conveyed, nor even under that act is the preference right of entry, by one who secures a cancellation of a prior entry, assignable.

Copp's L. O., Oct. 1882, p. 131.

Certain Indians, mentioned in 18 Stat. 420, and R. S. 2310-13, are entitled to the benefits of the act.

Every soldier, sailor, marine officer, or other persons coming within the provisions of the act may, as well in person as by agent, enter upon such homestead by filing a declaratory statement, etc.

§ 73. By virtue of the act of May 14, 1880, any person who has made a settlement on the public lands under the pre-emption laws, and has subsequent to such settlement changed his filing in pursuance of law to that of a homestead entry upon the same tract of land, is entitled to retain such homestead entry subject to provisions of law relating to the same, and to have the time required to perfect his title under the homestead laws computed from the date of his original settlement heretofore made or hereafter to be made under the pre-emption laws.

19 Stat. 404; 20 Id. 63.

§ 74. Congress, by the following act, has created another class of settlers who need not be qualified like pre-emptors or homestead settlers:

"All persons who shall have settled and made valuable and permanent improvements upon any odd-numbered section of land within any railroad withdrawal in good faith, and with the permission or license of the railroad company for whose benefit the grant shall have been made, and with the expectation of purchasing from such company the land so settled upon, which land so settled upon and improved may for any cause be restored to the public domain, and at the time of such restoration may not be entitled to enter and acquire title to such land under the homestead pre-emptions or timber-culture laws of the United States, shall be permitted at any time within three months of such restoration, and under such rules and regulations as the commissioner of the general land office may prescribe, to purchase, not to exceed 160 acres in extent of the same by legal subdivisions, at the price of \$2.50 per acre, and to receive a patent therefor.

"Approved January 13, 1881."

Homestead entries can be made for not more than one quarter-section, or 160 acres of land.

§ 75. *Fees in Land Office.*—The land office fees and commissions, payable when application is made, are as follows:

In Alabama, Arkansas, Dakota, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, and Nebraska—land at \$2.50 per acre: For 160 acres, \$18; for 80 acres, \$9; for 40 acres, \$7. Land at \$1.25 per acre: For 160 acres, \$14; for 80 acres, \$7; for 40 acres, \$6.

In Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—land at \$2.50 per acre: For 160 acres, \$22; for 80 acres, \$11; for 40

acres, \$8. Land at \$1.25 per acre: For 160 acres, \$16; for 80 acres, \$8; for 40 acres, \$6.50.

§ 76. *Directions how to Proceed.*—When a person desires to enter a tract of land upon which he has *not established a residence and made improvements*, he must appear personally at the district land office and present his application, and must make the required affidavits before the register and receiver. He must then establish his actual residence (in a house) upon the land within six months from date of entry, unless a further time be allowed by the land office, and must reside upon the land continuously for the period prescribed by law. In case of a single person, the actual residence must be established within the same time, and must be continuously and actually maintained for the same period. The homestead affidavit can be made before the clerk of the county court only in cases where the family of the applicant, or some one member thereof, is *actually residing* on land which he desires to enter, and on which he has made *bona fide* improvement and settlement, and when he is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office. In such cases the applicant must state, in a supplemental affidavit, the facts of such settlement, improvement, and residence; what acts of settlement have been performed and when made; the nature, extent, and value of the improvements; and what member or members of his family are residing on the land; and the length of time such residence has been maintained, and the cause specifically why the applicant can not appear at the local office.

Circular, March 20, 1883.

CHAPTER VII.

HOMESTEAD CONTESTS.

- § 77. How Initiated.
- § 78. Notice of Contest.
- § 79. Effect of Homestead Entry.
- § 80. Priority of Settlement Gives Priority of Right.
- § 81. Residence and Cultivation.
- § 82. Act May 14, 1880.
- § 86. Transmutation.
- § 89. Commutation.
- § 93. Act of June 15, 1890.
- § 94. Relinquishment.

§ 77. *How Initiated.*—Contests may be initiated by a party in interest, or by any other person, in the following cases:

1. Alleged abandoned homestead entries.
R. S. 2297.
2. Alleged abandoned or forfeited timber-culture entries.
20 Stat. 113.

In all other cases contests can be initiated only by a party in interest. In every case of application for a hearing, an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the ground of contest. Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

Rules of Practice, as to ordering hearings, see Rules of Practice, 5, 6, 7.

§ 78. *Notice of Contest.*—As to what the notice must contain, see rule 9 of Practice.

Service of Notice.—Personal notice must be made in all cases when possible, and when personal service can not be made, this fact must be shown by affidavit. Service by publication may be made by printing in some newspaper printed in the county where the land in contest lies; and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land.

20 Stat. 91; see also Rules of Practice.

As to the sufficiency of a notice, Secretary Schurz holds that "information which makes it the duty of a party to made inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry might lead." He also revises the rule of courts, and holds that "the sufficiency of notice in contested land cases is a question of fact."

Copp's L. L., vol. 2, p. 702.

But in the following case between a settler and a railroad company, a somewhat different rule was promulgated by Secretary Chandler, in which he held that notice must also be given to the opposing party who made the homestead entry, of the time and place where the contest will be heard. This notice should state the issues to be tried, and should as far as reasonably possible give the party to whom it issues specific information of the charges against him, or the nature of the claim set up in opposition to his, so that he may be able to present evidence to meet it. A simple notice of the hearing is wholly insufficient, and no decision based upon such notice can stand.

Watts v. R. R. Co., Copp's L. L., vol. 2, p. 863.

§ 79. A homestead party who procures the relinquishment of a sworn statement under the timber act of 1878 acquires no preference until the question of the character of the land has been decided.

Copp's L. O., July, 1882, p. 79.

A contest with the government is not a contest with adverse claims, and can not be brought within the act of June 16, 1880.

Case of Thomas Guinean, Copp's L. O., Nov. 1882, p. 153.

When one contest against a homestead entry is pending, a second application to contest will be rejected.

Application of Thomas Madison, Copp's L. O., April, 1882, p. 7.

In contests between homestead and mineral claimants, the burden of proof is on the mineral claimant; and in contests between homestead and railroad claimants, the burden is usually upon the party claiming through the railroad grant.

Small v. Howell, Copp's L. O., Dec. 1882.

When the proceedings before the register and receiver are lost, there must be an affidavit as to the facts, and a contest *de novo* will be ordered as if no proceedings had ever been had.

Zeigler's Case, Copp's L. O., June, 1882.

§ 80. A valid homestead claim is an appropriation of the

land, and remains such until a forfeiture is declared, and the reservation is removed. But in railroad cases, if a condition precedent is not complied with within the time provided, no act or declaration of forfeiture is necessary, and no subsequent performance can avail. And when such declaration is necessary, a legislative act directing the possession and appropriation of the land is equivalent to office found.

Insurance Co. v. Mowry, 6 Otto, 544; *McKibbin v. The United States*, 7 Id. 204; 5 Wall. 213.

§ 81. Where a settler upon public land dies before he has complied with the law in reference to residence and cultivation, he has no devisable estate, and the children take nothing by virtue of his entry. Heirs of a deceased settler do not take their rights by descent, but as donees of the government.

Hall et al. v. Russell et al., Sup. Ct. U. S., Oct. 5, 1879.

No land can be awarded to unknown heirs, because section 2291 of the revised statutes does not provide for the issuance of patents to any but citizens of the United States.

Letter of Secretary Schurz, Copp's L. O., vol. 7, p. 91.

§ 82. Other things being equal, priority of settlement determines the rights of the parties in all cases arising under the homestead laws, and where the party making the prior settlement has in all respects complied with the law, he is entitled to the land without regard to anything which a party making a later settlement may have done. In conflicts between a state and a settler, the party taking the first initiatory step, if the same is followed up to patent, acquires the better title, and the patent relates back to the initiatory act, and cuts off all intervening claims.

Stark v. Baldwin, 7 Neb. 114; *Shipley v. Cowan*, 1 Otto, 330.

§ 83. Homestead entries require continuous residence and cultivation; the fact that a homesteader camped and ate and slept on the land can not be regarded as a compliance with the statute. The applicant must have a house on the land, which he makes his home; and he must cultivate the land by raising any of the products ordinarily cultivated by farmers. The law should be liberally construed; and in grazing regions, using the land for stock-raising and dairy production is sufficient proof of cultivation.

Copp's L. O., vol. 7, p. 135; see also case of *Edwards v. Sexton*, under title, Final Proof.

§ 84. Parties can not, under the law of May 14, 1880, be

allowed credit for settlement or land withdrawn for railroad purposes prior to restoration thereof to market; nor, under the act, can a claimant be credited for any time he lived upon the land while it was covered by an uncanceled prior entry.

Copp's L. O., vol. 8, p. 92.

§ 85. Before the act of May 14, 1880, no homestead right could be conveyed, nor ever under that act is the preference right of entry by one who secures a cancellation of a prior entry assignable.

Copp's L. O., Oct. 1882, p. 131.

The election of a homestead claimant to take less land than the maximum to which he is entitled is a waiver of his claim to a larger quantity.

Copp's L. O., Dec. 1882.

A mistake which arises from an attorney's want of knowledge is no excuse for non-compliance with the law.

Copp's L. O., Sept. 1882, p. 115.

§ 86. *Transmutation.*—Pre-emptors who would transmute to homesteads must give notice to subsequent homestead claimants, who will be allowed to contest the transmutation; and this right of transmutation is a personal right, which does not descend to heirs.

Copp's L. O., Oct. 1882, p. 148; Copp's L. L., 1882, p. 619.

A soldier's right of entry can not be assigned. To acquire public land by homestead entry, a soldier must live upon and cultivate the land at least one year.

Letter of Commissioner McFarland, Copp's L. O., Jan. 1883, p. 195.

§ 87. A claimant of land who is lawfully confined in the penitentiary for life is civilly dead, but if he had previously to his conviction resided upon the land the required length of time, a trustee appointed by a court, and in some cases a wife, may prove up and receive the patent.

Copp's L. L., vol. 1, p. 425.

§ 88. When the secretary of the interior has officially decided any matter or case, and goes out of office, leaving the decision on record, his successor can not lawfully overturn it, unless upon the production of such new evidence as would be sufficient in a court of chancery to sustain a bill of review or to grant a new trial.

Opinion of Attorney General Black, 9 Opinions, 101.

§ 89. *Commutation.*—Homestead entries can be commuted to cash only after actual inhabitancy of the land by the homestead party, and his improvement and cultivation of it for a

period of not less than six months. A person who commutes a homestead entry can not move from the tract and settle on other public land in the same state or territory. A person commuting a homestead entry when he has not actually resided upon the land and improved and cultivated as required by law, forfeits all rights to the land and the purchase money paid, and in addition thereto renders himself liable to criminal prosecution.

Circular instructions of March 20, 1883.

In commutation cases, proof of settlement and cultivation for the prescribed period is to be made in the same manner as in pre-emption cases; that is to say, publication of notice to make proof is required precisely as in pre-emption and homestead cases, and the proof is to be taken in the same manner as in these cases. The applicant is required to show that he or she is either the head of a family, a single person over the age of twenty-one years, or a widow, and a citizen of the United States, that he or she has made a settlement in person upon the tract designated, that he or she has inhabited and improved the same for a period of six months and erected a dwelling thereon, and must make oath that he or she has not previously exercised the pre-emption right, and is not the owner of 320 acres of land; that he or she has not settled upon the land to sell the same on speculation, but in good faith to appropriate to his or her own exclusive use; that he or she has not made any contract or agreement, directly or indirectly, in any way or manner, with any person whomsoever, by which the title he or she may acquire from the United States shall inure, in whole or in part, to the benefits of any person except himself or herself.

R. S. 2262.

§ 90. In cases where pre-emption filings have been changed to homestead entries, and the parties come to make final proof, claiming credits for the period under pre-emption settlement, a full affidavit is required, stating qualification as pre-emptors, covering the period from the date of pre-emption to the date of change to homestead entry; and in cases of final proof, an additional affidavit will be required, as of homestead claimants, and the testimony of the claimant and his witnesses, as in homestead cases, covering the entire period from the date of settlement under the pre-emption laws.

Copp's L. L., 1882, p. 385; Circular of July 17, 1878; 5 Copp's L. O., p. 94.

A settler does not lose his rights under his pre-emption claim by a commutation to a homestead entry, and he may therefore,

if the proof is sufficient, include 160 acres in such homestead entry.

Southern Pacific R. R. Co. v. Wiggins et al., Copp's L. L., vol. 2, p. 937.

§ 91. The land department recognizes the validity of a pre-emption claim, based upon settlement and residence, on unoffered land, without the filing of a declaratory statement, in the absence of a valid adverse claim by an opposing settler; in other words, the land so occupied does not pass to the railroad company.

Leavenworth, L. & G. R. R. Co. v. The United States, 2 Otto, 733.

But in the absence of a claim of record, and of all proof of such settlement and residence, it will be held that the land inured to the grant.

Secretary Chandler's Letter, Copp's L. L., vol. 2, p. 937.

§ 92. Supreme court scrip and military bounty land warrants may be used in commutation of homesteads. As to the mode of location, see title, Land Warrants and Private Scrip.

§ 93. *Act of June 15, 1880.*—Cash entry may be made under section 2, act of June 15, 1880, although the homestead entry was void at its inception.

Case of George W. Maughn et al., Copp's L. O., June, 1882, p. 57.

Whenever an application is made to purchase under the act of June 15, 1880, it must be done under an affidavit of the applicant, giving a full and detailed statement of all the facts upon which he bases his claim to purchase; such sworn statement should be corroborated by the affidavits of credible witnesses, and then, if any doubt exists in the minds of the registers and receivers as to any of the questions involved, all the papers should be forwarded to the general land office, and no entry allowed until instructions are received from the commissioner. The party applying under this act must be twenty-one years of age, a citizen, or one who has made application to become such, and must be in other respects entitled to make the entry.

Copp's L. L., 1882, p. 496.

In cases of transfer, the instrument itself must be filed, together with the best evidence attainable of the *bona fide* character of the transfer, including the affidavit of the party who seeks to purchase. No entry should be allowed by the local officers which interferes with an entry of the land under the homestead laws, made subsequently to the original entry, on which application is made under section two of this act. The act contemplates only those cases in which the United States

and the applicant to purchase are alone interested at the time of entry.

Copp's L. L., 1882, p. 496; Circular Instructions, July 17, 1880; Copp's L. L., 1882, p. 497.

A party purchasing of a homesteader the improvements, right of entry, and possession of the same, and where the transfer is made by *bona fide* instrument in writing, can pay the government price for the same, under the act of June 15, 1880, and thus secure the title. But in the presence of an adverse claim, the cancellation of a homestead entry terminates its existence, and the act of June 15th does not apply.

Copp's, Aug. 1882, p. 95.

The act of May 14, 1880, grants a contingent preference right to the person who successfully contests a homestead entry, paying fees, etc. And it is held, that a person who has successfully contested a homestead entry under this act acquired such an adverse standing as prevents the entryman from paying for the land under the act of June 15, 1880.

Copp's L. L., 1882, p. 501.

But in a subsequent decision by Secretary Kirkwood, March 12, 1881, it was decided that a homestead claimant, whose entry is being contested on the ground of abandonment, under the act of May 14, 1880, may, under the act of June 15, 1880, purchase the tract entered, and thus prevent any right of the contestant attaching.

Copp's L. L., 1882, p. 503.

The right of a purchaser under this act is not personal, but descends to the heirs, and where entries are attempted to be made by transfers, under the act of June 15, 1880, there must be satisfactory proof that the attempted transfer was made prior to June 15, 1880. Final homestead proof not being required in these cases, no advertisement or notice of intention to make final proof is necessary, and no final homestead fees are to be paid or collected. No entry will be allowed under the second section when the original homestead entry was not a valid entry; nor when an entry under the homestead laws shall have been made on the same land subsequently to the original entry.

Copp's L. L., 1882, pp. 259, 260; Circular of October 1, 1880.

§ 94. *Relinquishment*.—In order to give effect to a relinquishment as evidence in a contested case, so as to inure to the benefit of the contestant, under the act of May 14, 1880, it must have been made before the closing of the testimony before the register and receiver on the allegation of abandonment.

Copp's L. L., 1882, p. 515.

CHAPTER VIII. HOMESTEADS.

FINAL PROOF.

- § 95. Two Modes of Obtaining a Patent.
- § 96. Notice of Final Proof.
- § 97. Proof—What and How.
- § 98. Act of May 14, 1880.
- § 100. Forfeiture and Abandonment.
- § 102. Additional Homesteads.
- § 103. Residence—Building House.
- § 104. Act of April 21, 1876.
- § 105. Lands Reserved from Railroad Grants.
- § 107. Rights under Homestead Entry.
- § 108. Heirs and Devisees.

§ 95. *Two Modes of Obtaining Patent.*—There are two modes of obtaining a patent under homestead laws after entry: one requiring a residence upon and cultivation of the land for five years; and the other, a residence upon and cultivation of the land for six months, and payment for the land at the government price, \$1.25 per acre. The latter course is known under the general name of commutation. The five-years limitation will be first considered. At the expiration of five years, or within two years thereafter, the person who has made entry, or if he be dead his widow, or, in case of her death, his heirs or devisee, or in case of a widow making such entry, her heirs or devisee in case of her death, must prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for a period of five years immediately succeeding the time of filing the first affidavit and entry, and must make an additional affidavit that no part of such land has been alienated except as provided in section 2288, revised statutes, and that he, she, or they will bear true allegiance to the government of the United States. After this affidavit and proof is made, then he, she, or they, if at that time citizens of the United States, are entitled to a patent as in other cases provided by law.

R. S. 2292.

§ 96. *Notice of Final Proof.*—A settler desiring to make final proof must file with the register of the proper land office

a written notice of his intention to do so, which notice will be published by the register in a newspaper to be by him designated as nearest the land, once a week for a period of thirty days, at the applicant's expense, and must also be posted up in the land office, in some conspicuous place, for the same period. This notice must state the names of his witnesses. On the hearing, two witnesses will be required, and their testimony must be taken separately by question and answer, and the claimant is required to testify as a witness in his own behalf in the same manner. The proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the oath of allegiance, required to be made by section 2291, revised statutes, may be made before the judge, or, in his absence, before the clerk of any court of record of the county and state or district and territory in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said state or territory, and the proof, affidavits, and oath, when so made and duly subscribed, have the same force and effect as if made before the register or receiver of the proper land district; and the same must be transmitted by said judge, or the clerk of his court, to the register and receiver, with the fees and charges allowed by law to him; and the register and receiver will be entitled to the same fees, for examining and approving said testimony, as are now allowed by law for taking the same; and if any witness making such proof, or the said applicant making said affidavit, swear falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being willful and corrupt, he will be guilty of perjury, and liable to the same pains and penalties as if he had sworn falsely before the register.

R. S. 2292; 20 Stat. 472.

§ 97. *Proof—What and How.*—Section 2297, revised statutes, has been amended by adding a proviso thereto, and as amended reads as follows: "If at any time after filing of the affidavits as required in section 2290, revised statutes, and before the expiration of the five years mentioned in section 2291, revised statutes, it is proved after due notice to the settler to the satisfaction of the register of the land office, that the person who filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government; *provided*, that where there may be climatic reasons, the commissioner of

the general land office may in his discretion allow the settler twelve months from the date of his filing in which to commence his residence on said land, under such rules and regulations as he may prescribe."

Entries and filings made for the purpose of holding the land for speculation, and the sale of relinquishments for this purpose, are illegal and fraudulent, and every effort in the power of the government will be exerted to prevent such frauds and to detect and punish the perpetrators.

§ 98. *Act of May 14, 1880.*—The first section of the act of May 14, 1880, provides that when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the commissioner of the general land office. This act refers to *bona fide* relinquishments of *bona fide* entries. (See section 94.) An entry fraudulent in its inception is not an entry capable of being relinquished. It is an entry to be canceled upon a proper showing of the facts and circumstances of the case, whereupon the land will become subject to proper entry by the first legal applicant. Purchasers of relinquishments of fraudulent filings or entries should understand that they purchase at their own risk so far as the United States is concerned, and must seek their own remedies under local laws against those who by imposing such relinquishments upon them have obtained their money without valuable consideration.

Copp's L. O., Jan. 1883, p. 194.

§ 99. The purchase of a house by a homestead claimant is equivalent to building one, but the seizure of an unoccupied house placed on the land by a former occupant who still asserts ownership in such house, although the entry of the land upon which it stands has been canceled, is not a legitimate source of title to the improvements unless the premises have been abandoned.

Copp's L. O., Jan. 1883, p. 194.

§ 100. *Forfeiture and Abandonment.*—Abandonment is a question of fact, depending on the intention of the party. Leaving vacant for five years does not necessarily raise a presumption of abandonment.

12 Mo. 239; Judson v. Malloy, 40 Cal. 300.

Notwithstanding the statute as to forfeiture, if the claimant

files his claim after the required time, but before another claim has intervened, his right will be saved, because it is then a question between the government and the party only, and no one is harmed.

Johnson v. Townley, 13 Wall. 72.

§ 101. In a pre-emption case in California (*Jenkins v. Lick*), it was held by the acting secretary, that where the pre-emptor moved from his claim before paying for it, and sold the land to pay his debts, and the purchaser advanced the necessary money to pay for the land at the local land office, under a verbal agreement to receive a deed from the pre-emptor, it is not a violation of the provision that the pre-emptor shall not directly or indirectly make any agreement to convey the land. But this decision seems to be based upon the fact, that in California no contract or agreement for the sale or conveyance of land is valid unless the same is in writing and signed by the party.

Copp's L. O., Dec. 1882.

§ 102. *Additional Homesteads*.—Where an additional homestead entry is made under the act of March 3, 1879, the law does not require that the lands embraced in the additional entry shall be actually cultivated to a crop. If it be used as a home, the intention of the act is attained. Under this act no credit for a period of settlement prior to entry is allowed. No greater credit than four years can be given. If the party is entitled to a credit for a period of four years, he will be required to make proof showing compliance with the law in respect to the additional entry tract for the period of one year from the date of entry. Final proof in case of an additional homestead entry, where final proof on the original has been made, will be sufficient if it shows residence on the original tract, and cultivation and improvement on the additional tract at the date of final proof.

Copp's L. L., 262; Id., 1882, p. 401; Copp's L. O., Oct. 1882, p. 48.

§ 103. *Residence*.—A *bona fide* claim should not be rejected because the claimant's house was by mistake beyond the lines of survey bounding his land. Residence is a material requirement of the homestead laws, and can not be dispensed with, but the homestead act should be liberally construed, so far as the government is concerned. Where a person, though not at all times on the land, has no other recognized home, and claims and improves the land entered, in all respects showing that his claim is made in good faith, he has fulfilled the requirements

of the statute. An actual personal and continuous residence is not in all cases necessary.

Edwards v. Sexton, Copp's L. O., July, 1882, pp. 70, 72.

Although a homestead entry vests no title, yet it gives a right of possession, which may be perfected, and when perfected, the homestead party is entitled to a patent, which relates back to the time when the entry was made, and takes date with it.

R. R. Co. v. Gordon, Copp's L. L., vol. 2, p. 886.

§ 104. *The Act of April 21, 1876.*—This is a remedial statute, and should receive a liberal construction. Secretary Schurz, in his letter of October 12, 1877, after reviewing briefly the state of facts which induced congress to pass the act now under consideration, uses the following language: "There can be no doubt that it was the intention of congress to afford relief to all persons who had settled on this class of lands *after* the filing of maps of definite location, *but before notice of withdrawal was received at the local office.*" In his letter of April 4, 1879, the secretary, in construing the second section of said act, says that three things must concur in order to give validity to entries under this section, to wit:

1. There must have been a valid pre-emption or homestead claim existing on the land at the time of the withdrawal for the railroad.

2. The land must have been re-entered under decisions or rulings of the land department.

3. The claimant must show that he has complied with the requirements of the pre-emption or homestead laws since the date of his filing or entry. In order to make a matter *res judicata*, there must be an identity of the thing, the cause, the persons, and the quality of the person for or against whom the claim is made.

Copp's L. L., vol. 2, p. 841, 846.

In construing this act, Secretary Teller, in a letter to the commissioner, dated October 20, 1882, holds that a settlement and filing constitute an entry under the act, and that the language, "at a time subsequently to the expiration of such grant," has reference to the dates named in the various granting acts to railroads, as the dates at which the roads should be completed, and not to a given time when by legislative or judicial action a forfeiture might be declared.

Copp's L. O., Dec. 1882.

A valid homestead entry is an appropriation of the land, and

remains such until a forfeiture is declared in accordance with law and the rules and regulations of the general land office, and thus only can the reservation be removed.

Copp's L. L., vol. 2, p. 874.

A party's claim based upon settlement and residence, on un-offered land, is valid without the filing of a declaratory statement, or an entry, in the absence of a valid adverse claim by an opposing settler.

Copp's L. L., vol. 2, p. 937.

Where a railroad grant contains reservations as to homestead and pre-emption rights, and there is a valid homestead entry upon the land at any time before the final and definite location of the line of the railroad, the entry will be sustained.

Copp's L. L., vol. 2, p. 937.

§ 105. *Lands Reserved for Railroad Grants.*—The supreme court of the United States hold that reserved lands are absolutely and unconditionally excepted from the grant, and it makes no difference whether or not they subsequently become a part of the public lands of the country.

R. R. Co. v. United States, 2 Otto, 733.

But a patent can issue only when authorized by some act of congress, no matter how perfect the title.

Whittaker v. R. R. Co., 8 Wash. Law Rep. 489; Sherman v. Buick, 3 Otto, 209.

§ 106. The supreme court of California and the supreme court of the United States have both held that in pre-emption cases previous to the issuance of a certificate of purchase or a patent, the settler acquires no absolute rights; in other words, that when all the prerequisites have been complied with, and the purchase money paid, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be deprived. Until such payment and entry, the pre-emption laws give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.

Hutchings v. Low, 15 Wall. 77.

The homestead law differs essentially from the pre-emption law in this: that under the pre-emption statute an entry is not permitted until payment is made; whereas under the homestead law an entry is allowed at once. A homestead entry is a legal appropriation of the land, and from the moment of

such entry the land becomes severed from the mass of public lands, and no subsequent law, proclamation, or sale can be construed to embrace or operate upon it, although no reservation may have been made of it.

Myers v. Croft, 13 Wall. 291; 13 Pet. 498; 4 Wall. 210; 2 Otto, 733;
Letter of Secretary Chandler, Copp's L. L., p. 869.

As between one homestead settler and another, the first in time in the commencement of proceedings for the acquisition of title when the same are regularly followed up, is deemed to be the first in right.

Shepley v. Cowan, 1 Otto, 330; 5 Saw. 605.

§ 107. *Rights under Homestead Entry*.—Many of the railroad grants, if not all, contain a reservation of all lands sold, reserved, or otherwise disposed of by the United States, and also of all lands to which a pre-emption or homestead claim may have attached. These acts, as we have already seen, have been construed to mean that if at the date of the grant there was a valid settler's claim of record upon the tract, the same was excepted from and did not pass with the grant; and that if the settler's rights were afterwards forfeited or abandoned, the tract reverted to the government and not to the railroad company, and that such land, after forfeiture or abandonment, became again subject to homestead and pre-emption laws.

R. R. Co. v. United States, 2 Otto, 733.

It is true that a different rule is prescribed by the land department in the circular instructions of November 7, 1879 (Copp's L. L., vol. 2, p. 716); but the supreme court is the highest authority we have upon these questions, and their opinions are of course controlling. Acting Secretary Joselyn observed the supreme court rule in his letter of November 6, 1882, in which he holds, that although a pre-emptor settled upon a tract subsequently to the definite location of the railroad opposite the same, and although he failed to file his declaratory statement within the prescribed time, yet the remedy conferred by the third section of the act of April 21, 1876, cures the technical defects in his case, and the settler is entitled to enter the land.

Copp's L. O., Dec. 1882.

When qualified settlers have filed declaratory statements, or made entries within the limits of a railroad grant, before the filing in the local land office, of the final survey or definite location of the line of the road, but after the date of the grant

(and where there has been no legislative or executive withdrawal of the specific tract sought to be entered), the railroad grant, though a grant *in presenti*, is subject to pre-emption and homestead entry, and if the claims are regularly followed up the parties are entitled to patents.

Perkins v. C. P. R. R. Co., Copp's L. O., Jan. 1883.

§ 108. *Heirs and devisees*.—The heirs or devisees of a deceased homestead claimant can not be held responsible for a failure of a public officer to administer upon the estate, and the statute does not run against the heirs during the time which elapses after the death of the claimant and the date the administrator takes charge of the estate, providing the heirs are without notice of their rights, and the estate is administered upon within seven years from date of entry.

Robinson v. Williams, Copp's L. L., p. 436.

In case of a deceased claimant who had not resided upon or cultivated the land embraced in his entry, the heir or devisee, though not required to reside upon, must cultivate and improve the tract, or the entry may be contested for abandonment.

Copp's L. L., p. 459.

A devisee of a homestead claimant is entitled to all the privileges that would descend to the heirs.

Copp's L. L., p. 460.

§ 109. Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections 16 and 36, those sections are subject to the pre-emption claims of such settlers.

Bernard v. Ashley, 18 How. 43; R. S. 2275; Sherman v. Buick, 3 Otto, 209; Water and Mining Co. v. Bugbey, 6 Id. 165.

Settlers on lands that have been reserved on account of claims under French, Spanish, or other grants which have been or may hereafter be declared by the supreme court of the United States to be invalid, are entitled to all the rights of pre-emptors after the lands have been released from reservation, in the same manner as if no reservation had existed.

R. S. 2280; Mahoney v. Van Winkle, 33 Cal. 448; Umbrager v. Chaboya, 49 Id. 525; Rutledge v. Murphy, 51 Id. 389.

CHAPTER IX. HOMESTEADS.

PRACTICE.

- § 110. What Notices should Contain.
- § 111. Credit for Residence.
- § 114. Jurisdiction of Courts—General Rule.
- § 115. Presumptions under Patent.
- § 117. Appeals.
- § 120. Additional Homesteads.
- § 121. Act of March 3, 1879.
- § 122. Act of July 1, 1879.

§ 110. *What Notices should Contain.*—All notices of contests and all notices under which a contest may arise must state the ultimate facts upon which the party giving the notice will rely at the hearing; in other words, issues must be joined in such contests before the land offices, as well as before the courts, and the proof must be confined to the allegations, and judgment rendered on questions at issue only.

Schelter v. Off, Copp's L. O., vol. 8, p. 53.

Great latitude is sometimes allowed, but generally the ordinary rules of evidence should be applied in contests before the register and receiver.

Packard v. Jackson, Copp's L. O., Jan. 1883, p. 187.

§ 111. *Credit for Residence.*—Parties can not, under the law of May 14, 1880, be allowed credit for settlement on land withdrawn for railroad purposes prior to the restoration thereof to market, nor, under the act, can a claimant be credited for any time he lived upon the land while it was covered by an uncanceled prior entry. By the terms of the second section of the act of June 14, 1880, a contestant acquires no right or privilege, nor could another entry of the tract be made until the contested entry had been canceled upon the records of the office when it became subject to entry by the first legal applicant. It is not the contest, but its resultant, the cancellation procured by himself, which confers upon the contestant a preference right of entry. The proviso of the section affects only entries made subsequent to the initiation of the contest. The second section of the act of June 15th is independent in its provisions and purposes. It pro-

vides for a specific thing, without reference to the act of May 14, 1880, which would doubtless have been made, were it intended the two should have been construed *in pari materia*; and the later expression of legislative intent must operate as a repeal or modification of the provisions of an earlier act which conflicts therewith. Therefore, where it appears that the lands embraced in an entry were subject thereto, that there was no other entry on the same, and nothing on record except the contest upon the ground of abandonment, the entryman may purchase the tract, under the second section of the act of June 15, at any time prior to the cancellation of his entry, and thus prevent the right of contestant from attaching to the land.'

Gorham v. Ford, Letter of Secretary Kirkwood to the Commissioner, dated March 12, 1881; Copp's L. O., vol. 8, pp. 6, 92; Copp's L. L., p. 514.

§ 112. Courts seldom, if ever, interfere to control the regular course of proceedings in the land department. In the case of the United States *ex rel.* McBride v. Carl Schurz, the supreme court of the United States uses the following language: "Congress has enacted a system of laws by which rights to these lands [public lands] may be acquired, and the title of the government conveyed to the citizen, and this court has with a strong hand upheld the doctrines, that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring title were as yet *in fieri* before this special tribunal created by congress, for deciding the questions which should arise in the course of these proceedings, the court would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

Sickels' Mining Laws, p. 616, where the opinion is given entire.

§ 113. An allegation of fraud stating the facts, and imposition of false testimony upon the register and receiver as to the settlement and cultivation, will give a court of equity jurisdiction. Misconstruction of the law by the officers of the department will sometimes authorize the interference of the courts, but it must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them; and where fraud and misrepresentation are relied upon as grounds of interference by the courts, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the government.

Little v. State of Arkansas, 22 How. 193.

§ 114. *Jurisdiction of Courts—General Rule.*—The rule seems to be, that in contests for tracts of public land other than mineral land, neither courts of law nor courts of equity have any jurisdiction to interfere with the regular course of proceedings before the land department; but after patent has issued, and the legal title passes from the government, then courts of equity, upon a proper showing, may set aside the proceedings before the land department, and may, when justice demands it, vacate patents, and declare them null and void.

Baldwin v. Starks, 2 Sup. Ct. Rep. 473; Little v. State of Arkansas, 22 How. 193; State v. Bachelder, 1 Wall. 109; Lindsey v. Howes, 2 Black, 554.

The most clear and well-defined opinion as to the object of the creation of the land department of the government, and the powers it possesses in the alienation by patent of portions of the public lands, is that of Justice Field, in the supreme court of the United States, in the case of Steel et al. v. St. Louis Smelting Co. Speaking for the court, he says: "That department [the land department], as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

He then cites and quotes from Johnson v. Townsley, 13 Wall. 83; French v. Fyan, 93 U. S. 172; Quinby v. Conlan, 104 Id. 426; and then the learned judge goes on to say: "It need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and the objection to it could be taken on these grounds at any time and in any form of action. But the validity of a patent from the government can not be assailed collaterally because false and perjured testimony

may have been used to secure it; any more than the judgment of a court of justice can be assailed on like grounds.

106 U. S. 447.

If proceedings are ever stayed before the land department by departmental order for special reasons until the determination of a question before the courts as to the right of possession to a certain tract of land, it is more an act of courtesy and deference to the judicial department of the government than a duty or obligation imposed by law.

§ 115. *Presumptions under Patent.*—The presumptions under a patent are that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character in a court of law that gives to it its chief, indeed its only, value. But in a court of equity, as we have seen, a patent may be impeached upon many grounds by a direct proceeding; and in an action at law, it may be collaterally impeached on the ground that the law did not provide for selling of the lands, or that they had been reserved from sale or dedicated to special purposes, or that they had been previously transferred by government to others.

Copp's L. O., April, 1882, p. 15.

A party desiring to have a patent set aside should make application to the secretary of the interior for permission to proceed in the name of the government in the proper circuit court of the United States. The application should be accompanied with affidavits of merit, stating the facts in detail on which the party expects to rely. But where the party interested can plead an estoppel, or simply desires to hold the patentee of the government as trustee, and to have the court declare that he holds the property for the benefit of another, suits are sometimes commenced in state courts, but upon a proper showing they are frequently transferred to circuit courts of the United States.

§ 116. *Mandamus* will lie to compel the delivery of a patent after it is issued.

United States ex rel. McBride v. Carl Schurz, Sickels' Mining Laws, p. 610.

§ 117. *Appeals.*—An appeal lies from the decision of the register and receiver to the commissioner of the general land office; from the decision of the commissioner to the secretary of the interior; and the supreme court of the United States

say, in *Shepley et al. v. Cowan*, 1 Otto, 330, that perhaps, under special circumstances, an appeal may be taken to the president.

See Rules of Practice, 86.

The rule is that the ordering of rehearing is a matter within the discretion of the commissioner of the general land office, from whose decision an appeal does not lie.

Copp's L. O., vol. 6, p. 4.

When a homestead entry upon public lands has been made by a settler, the land so entered can not, while such entry stands, be set apart by the president for a military reservation, even prior to the completion of full title in the settler; but land covered by pre-emption filing may be so set apart to final proof.

Copp's L. L., p. 387.

§ 118. The secretary of the interior holds that the failure of a claimant to file in time does not defeat his claim except when another settler has filed and complied with the law. This decision overrules the department decision in the case of *Serreno v. Southern P. R. R. Co.*

Copp's L. O., vol. 8, p. 181.

§ 119. Borax, nitrate and carbonate of soda, sulphur, alum, and asphalt should be located under the instructions and regulations of October 31, 1881.

§ 120. *Additional Homesteads.*—There is a class of homesteads designated as "adjoining farm homesteads." In these cases the law allows an applicant owning and residing on an original farm to enter other land lying contiguous thereto, which shall not, with such farm, exceed in the aggregate 160 acres, under section 2289 of the revised statutes as modified by the acts of congress of March 3, 1879, July 1, 1879, and June 15, 1880, before mentioned. In applying for land of this class, the party must make affidavit describing the tract which he owns, and upon which he resides, as his original farm. In making final proof, it is not required that he should prove actual residence on the separate tract entered; but if he does not, it must appear from the proof adduced that he has continued for the period required by law to reside upon and cultivate the original farm tract, making use of the entered tract as a part of the homestead.

§ 121. *Act of March 3, 1879.*—The act of March 3, 1879, in addition to its provisions already referred to, provides, that "any person who has, under existing laws, taken a home-

stead on any even section within the limits of any railroad or military road land grant, and who, by existing laws, shall have been restricted to eighty acres, may enter, under the homestead laws, an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry," without payment of fees and commissions, and that "the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional entry, and shall be deducted from the five years' residence required by law," with the proviso, however, that in no case shall patent issue "until the person has actually and in conformity with the homestead laws occupied, resided upon, and cultivated the land" embraced in his additional entry "at least one year."

§ 122. *Act of July 1, 1879.*—The act of July 1, 1879, is similar in effect. Upon any party proposing to enter an additional tract under these provisions, the register and receiver will require him to submit proof which shall set forth the particulars of his existing entry, and of his compliance with the legal requirements regarding the same, according to forms provided for use in making final proof, 4-369 and 4-370, as also to swear that he did not serve in the army or navy of the United States during the late civil war for ninety days or more, as the class of persons who thus served were not restricted to eighty acres, under previously existing laws, and therefore are not entitled to the benefits of the acts referred to, and to make homestead application and affidavit according to attached forms, 4-018 and 4-086. The required proof is found necessary to ascertain the *status* of the original entry at the date of application for the benefit of the said acts, and also the credit for residence and cultivation to which the party who made the same may be entitled, according to their provisions, in perfecting his title under the additional or new entry to be allowed, without waiting the arrival of the time when final proof on the latter is to be made.

With reference, however, to cases in which final proof on the original entries has been made and the certificate issued, the requirement of proof as herein directed may be omitted, and in lieu thereof, a reference made in reporting the case to the certificate issued, giving its number and date, so that it may be identified on the records of this office.

§ 123. These requirements having been complied with, the register and receiver will then, if they find his original entry to be

intact on their records, whether patented or not, and if no objection appears in any respect, allow the entry applied for, note the same on their records, giving it the proper number in the regular homestead series, and report it with their monthly homestead returns, indicating its character as an additional entry under said act on the margin of their monthly abstracts, with a reference to the original entry by its number, and the description of the land. The money columns in the abstracts will of course be left blank, since there will be no fees and commissions paid. In this class of entries the party, if still resident on the original entry tract, will not be required to remove therefrom to the additional entry tract in order to make a new residence on the latter, as the two forming one body of land, residence on either will be regarded as satisfying the legal requirement; but in making final proof on the additional entry, the party must show such residence, with occupancy and cultivation of the tract taken as additional under said act, for five years from the date of entry thereof, less the time to be deducted on account of residence and cultivation on the original entry, which shall not exceed four years in any case.

The acts further provide, that should the person so elect, he may, instead of making an additional entry, "surrender his existing entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made," with the same provisions, as regards fees and commissions not being required, and requiring settlement and cultivation, occupation, and residence, as have been already stated with regard to additional entries. In case of any party electing to surrender his entry under this act, the register and receiver will receive his relinquishment, which shall specify for what purpose made, and be accompanied by the duplicate receipt issued for the relinquished entry, or by a statement under oath showing a good reason for its absence, report the case in a special letter to this office, and await instructions before proceeding further in the matter. Relinquishments may be made in the same manner as hereinbefore provided for.

See also opinion of commissioner, Copp's L. L., p. 401.

CHAPTER X.

HOMESTEADS.

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§ 124. *Who may Enter Certain Unappropriated Public Lands.* Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

12 Stat. 392; 18 Id. 15, 22, 194, 334, 420; 19 Id. 35, 405; R. S. 2289.

§ 125. *Mode of Procedure.*—The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment

of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.

12 Stat. 392; 13 Id. 35; 14 Id. 67; 18 Id. 192, 420; R. S. 2290.

§ 126. *Pre-emption Filing Changed to Homestead Entry.*—Any person who has made a settlement on the public lands under the pre-emption laws, and has subsequent to such settlement changed his filing in pursuance of law to that for a homestead entry upon the same tract of land, shall be entitled, subject to all the provisions of law relating to homesteads, to have the time required to perfect his title under the homestead laws computed from the date of his original settlement heretofore made, or hereafter to be made, under the pre-emption laws.

19 Stat. 404; 20 Id. 63.

§ 127. *Homestead Settlers Allowed Same Time as Pre-emptors to File Application for Lands.*—Any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

21 Stat. 140, 141.

§ 128. *Certificate and Patent, when Given and Issued.*—No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow, or in case of her death, his heirs or devisee, or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288 R. S., and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. The proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the

oath of allegiance, required to be made by this section, may be made before the judge, or, in his absence, before the clerk, of any court of record of the county and state, or district and territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said state or territory; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and the receiver, with the fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same; and if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register.

14 Stat. 67; 18 Id. 81; 19 Id. 403; R. S. 2291.

§ 129. *When Rights Inure to the Benefit of Infant Children.*—In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children for the time being have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

14 Stat. 67; R. S. 2292.

§ 130. *Homestead Entries of Insane Persons Confirmed in Certain Cases.*—In all cases in which parties who regularly initiated claims to public lands as settlers thereon, according to the provisions of the homestead laws, have become insane, or shall hereafter become insane, before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their

claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the commissioner of the general land office that the parties complied in good faith with the legal requirements up to the time of their becoming insane; and the requirement in homestead entries of an affidavit of allegiance by the applicant, in certain cases as a prerequisite to the issuing of the patents, shall be dispensed with so far as regards insane persons.

21 Stat. 166.

§ 131. *Persons in Military or Naval Service, when and before Whom to Make Affidavit.*—In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States is unable to do the personal preliminary acts at the district land office which the preceding sections require, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged; which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

13 Stat. 35; R. S. 2293.

§ 132. *When Persons may Make Affidavit before Clerk of Court.* In any case in which the applicant, for the benefit of the homestead, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident, and to transmit the same, with the fee and commissions, to the register and receiver.

13 Stat. 35; 18 Id. 192; R. S. 2294.

§ 133. *Record of Applications.*—The register of the land office shall note all applications under the provisions of this chapter, on the tract-books and plats of his office, and keep a register of all such entries, and make return thereof to the general land office, together with the proof upon which they have been founded.

12 Stat. 393; R. S. 2295.

§ 134. *Homestead Lands not to be Subject to Prior Debts.*—No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

12 Stat. 393; R. S. 2296.

§ 135. *When Lands Entered for Homestead Revert to Government.*—If, at any time after the filing of the affidavit, as required in section 2290 R. S., and before the expiration of the five years mentioned in section 2291 R. S., it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government; *provided*, that where there may be climatic reasons, the commissioner of the general land office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

12 Stat. 393; 18 Id. 294; 19 Id. 36; R. S. 2297.

§ 136. *Publication of Notice of Contest in Homestead Cases.*—The notices of contest provided by law, under the homestead laws, shall be printed in some newspaper printed in the county where the land in contest lies; and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land.

20 Stat. 91; Cir. G. L. O., June 12, 1878, 5 Copp's L. O. 101; General Cir., Sept. 1, 1879, p. 14.

§ 137. *Notice of Intention to Make Final Proof.*—Before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established.

20 Stat. 472.

§ 138. *Publication of Notice of Entry.*—Upon the filing of the notice required by the preceding section, the register shall publish a notice that such application has been made, once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days, the claimant shall be entitled to make proof in the manner provided by law. The secretary of the interior shall make all necessary rules for giving effect to the foregoing provisions.

20 Stat. 472.

§ 139. *Lands Covered by Relinquished Homestead Claims Subject to Entry at Once.*—When a homestead claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held open to settlement and entry without further action on the part of the commissioner of the general land office.

21 Stat. 140.

§ 140. *Party Contesting Homestead Entry to be Allowed Thirty Days after Notice of Cancellation to Make Entry.*—In all cases where any person has contested, paid the land office fees, and procured the cancellation of any homestead entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter such lands; and the register shall be entitled to a fee of one dollar for giving such notice, to be paid by the contestant, and not to be reported.

21 Stat. 140, 141.

§ 141. *Limitation of Amount Entered for Homestead.*—No person shall be permitted to acquire title to more than one quarter-section under the provisions of this chapter.

12 Stat. 393; R. S. 2298.

§ 142. *Existing Pre-emption Rights not Impaired.*—Nothing contained in this chapter shall be so construed as to impair or interfere in any manner with existing pre-emption rights; and all persons who may have filed their applications for a pre-emption right prior to the twentieth day of May, eighteen hundred and sixty-two, shall be entitled to all the privileges of this chapter.

12 Stat. 393; R. S. 2299

§ 143. *What Minors may have the Privileges of this Chapter.*—No person who has served, or may hereafter serve, for a period not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of any actual war, domestic or foreign, shall be deprived of the benefits of this chapter on account of not having attained the age of twenty-one years.

12 Stat. 393; R. S. 2300.

§ 144. *Payment before Expiration of Five Years; Rights of Applicant.*—Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2298 R. S. from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights.

12 Stat. 393; R. S. 2301.

§ 145. *No Distinction on Account of Race or Color, etc.*—No distinction shall be made in the construction or execution of this chapter on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

14 Stat. 67; R. S. 2302.

§ 146. *What Lands Disposed of Only as Homesteads.*—All the public lands in the states of Alabama, Mississippi, Louisiana, Arkansas, and Florida shall be disposed of in no other manner than according to the terms and stipulations contained in the preceding provisions of this chapter.

R. S. 2303.

Disposition of Lands in Certain States.—Section 2303 of the revised statutes of the United States, confining the disposal of the public lands in the states of Alabama, Mississippi, Louisiana, Arkansas, and Florida to the provisions of the homestead law is hereby repealed; *provided*, that the repeal of said section shall not have the effect to impair the right, complete or inchoate, of any homestead settler, and no land occupied by such settler at the time this act shall take effect shall be subject to entry, pre-emption, or sale; *and provided*, that the public lands affected by this section shall be offered at public sale, as soon as practicable from time to time, and according to the provisions of existing law, and shall not be subject to private entry until they are so offered.

14 Stat. 67; 19 Id. 73, 377; R. S. 2303.

§ 147. *Soldiers' and Sailors' Homesteads.*—Every private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February 13, 1862, and every seaman, marine, and officer who has served in the navy of the United States, or in the marine corps, during the rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

17 Stat. 333; R. S. 2304.

§ 148. *Deduction of Military and Naval Service from Time, etc.*—The time which the homestead settler has served in the army, navy, or marine corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

17 Stat. 333; R. S. 2305.

§ 149. *Persons Who have Entered Less than One Hundred and Sixty Acres, Rights of.*—Every person entitled, under the provisions of section 2304 R. S., to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres.

17 Stat. 333; R. S. 2306.

- § 150. *Widow and Minor Children of Persons Entitled to Homestead, etc.*—In case of the death of any person who would be entitled to a homestead under the provisions of section 2304 R. S., his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the department of the interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; but if such person die during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.
17 Stat. 333; R. S. 2307.

§ 151. *Actual Service in the Army or Navy Equivalent to Residence, etc.*—Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a patent therefor may be determined by the proofs touching his residence and cultivation of the first tract, and his absence therefrom in such service.

17 Stat. 333; R. S. 2308.

§ 152. *Who may Enter by Agent.*—Every soldier, sailor, marine, officer, or other person coming within the provisions of section 2304 R. S., may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

17 Stat. 334; R. S. 2309.

§ 153. *Homestead Right Extended to Indians Who Sever their Tribal Relations.*—Any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon,

his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the secretary of the interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and the acts amendatory thereof, except that the provisions of the eighth section of said act shall not be held to apply to entries made under this section. The title to lands acquired by any Indian under this section shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall remain inalienable for a period of five years from the date of the patent issued therefor. Any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void.

18 Stat. 420.

§ 154. *Certain Indian Homesteads Confirmed.*—In all cases in which Indians have heretofore entered public lands under the homestead law, and have proceeded in accordance with the regulations prescribed by the commissioner of the general land office, or in which they may hereafter be allowed to so enter under said regulations prior to the promulgation of regulations to be established by the secretary of the interior under the preceding section, and in which the conditions prescribed by law have been or may be complied with, the entries so allowed are hereby confirmed, and patents shall issue thereon; subject, however, to the restrictions and limitations contained in the preceding section in regard to alienation and incumbrance.

18 Stat. 420.

§ 155. *Chiefs, etc., of Stockbridge Munsees, Homestead Rights of.*—Each of the chiefs, warriors, and heads of families of the Stockbridge Munsee tribes of Indians, residing in the county of Shawano, state of Wisconsin, may, under the direction of the secretary of the interior, enter a homestead and become entitled to all the benefits of this chapter, free from any fee or charge; and any part of their present reservation, which is abandoned for that purpose, may be sold, under the direction of the secretary of the interior, and the proceeds applied for the benefit of such Indians as may settle on homesteads, to aid them in improving the same.

13 Stat. 562; R. S. 2310.

§ 156. *Exemption of Homestead of Stockbridge Munsees.*—The homestead secured by virtue of the preceding section shall not be subject to any tax, levy, or sale; nor shall it be sold, conveyed, mortgaged, or in any manner incumbered, except upon the decree of the district court of the United States, as provided in the following section.

13 Stat. 562; R. S. 2311.

§ 157. *Stockbridge Munsees Becoming Citizens.*—Whenever any of the chiefs, warriors, or heads of families of the tribes mentioned in section 2310 R. S., having filed with the clerk of the district court of the United States a declaration of his intention to become a citizen of the United States, and to dissolve all relations with any Indian tribe, two years previous thereto, appears in such court, and proves to the satisfaction thereof, by the testimony of two citizens, that for five years last past he has adopted the habits of civilized life; that he has maintained himself and family by his own industry; that he reads and speaks the English language; that he is well disposed to become a peaceable and orderly citizen; and that he has sufficient capacity to manage his own affairs; the court may enter a decree admitting him to all the rights of a citizen of the United States, and thenceforth he shall be no longer held or treated as a member of any Indian tribe, but shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities to taxation, of other citizens of the United States. But nothing herein contained shall be construed to deprive such chiefs, warriors, or heads of families of annuities to which they are or may be entitled.

13 Stat. 562; R. S. 2312.

§ 158. *Unsold Lands of the Ottawa and Chippewa Indians, how Opened for Homesteads.*—The unoccupied lands in the reservation made for the Ottawa and Chippewa Indians, of Michigan, by the treaty of July 31, 1855, shall be open to homestead entry for six months from the tenth day of June, 1872, by Indians only of those tribes, who have not made selections or purchases under the treaty, including such members of the tribes as have become of age since the expiration of the ten years named in the treaty; and every Indian so entitled shall be permitted to make his homestead entry, at the local land office, within such six months, of not exceeding 160 acres, or one quarter-section of minimum, or 80 acres of double-minimum

land, on making proper proof of his right, under such rules as may be prescribed by the secretary of the interior.

17 Stat. 381; 18 Id. 516; 19 Id. 55; R. S. 2313.

§ 159. *Selections for Minors under Preceding Section.*—The collector of customs for the district in which such land is situated is authorized, and it is made his duty, to select for such minor children as would be entitled, under the preceding section, as the heirs of any Indian.

17 Stat. 381; 18 Id. 516; 19 Id. 55; R. S. 2314.

§ 160. *Bona fide Settlers on Above Lands Prior to, etc.*—All actual, permanent, *bona fide* settlers on any of such lands who settled prior to the first day of January, 1872, shall be entitled to enter either under the homestead laws or to pay for at the minimum or double-minimum price, as the case may be, not exceeding 160 acres of the former, or 80 acres of the latter class of land, on making proof of his settlement and continued residence before the expiration of six months from the tenth day of June, 1872.

17 Stat. 381; 18 Id. 516; 19 Id. 55; R. S. 2315.

§ 161. *Certain Lands to be Patented to Indians Making Selections.*—All selections of such lands by Indians heretofore made, and regularly reported and recognized as valid and proper by the secretary of the interior and commissioner of Indian affairs, shall be patented to the respective Indians making the same; and all sales heretofore made and reported, where the same are regular and not in conflict with such selections, or with any other valid adverse right, except of the United States, are confirmed, and patents shall issue thereon as in other cases according to law.

17 Stat. 381; 18 Id. 516; 19 Id. 55; R. S. 2316.

§ 162. *Cultivation of Trees on Homestead Tracts.*—Every person having a homestead on the public domain, under the provisions of this chapter, who, at the end of the third year of his residence thereon, shall have had under cultivation, for two years, one acre of timber, the trees thereon not being more than twelve feet apart each way, and in a good, thrifty condition, for each and every sixteen acres of such homestead, shall, upon due proof of the fact by two credible witnesses, receive his patent for such homestead.

17 Stat. 606; 18 Id. 21, 481, 516; 19 Id. 54; R. S. 2317.

§ 163. *Entry of One Hundred and Sixty Acres of Double-minimum Lands Allowed after March 3, 1879—Additional Entry*

of Adjoining Lands Allowed—New Entry, when Allowed.—From and after March 3, 1879, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any state in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of 160 acres to each settler; and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant, and who, by existing laws, shall have been restricted to 80 acres, may enter under the homestead laws an additional 80 acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or, if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of 80 acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law; *provided*, that in no case shall patent issue upon an additional or new homestead entry under this section until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year.

20 Stat. 472.

§ 164. *Homestead Claimants or their Assignees may Purchase Lands at One Dollar and Twenty-five Cents per Acre in Certain Cases.*—Persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than \$1.25 per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price; *provided*, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

21 Stat. 237, 238.

§ 165. *Confirmation of Homestead Entries within Railroad Limits Made Prior to Receipt of Notice of Withdrawal at Local Office.*—All homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than 160 acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

19 Stat. 35, 36.

§ 166. *Lands within Railroad Grants Re-entered by Claimants after Abandonment.*—When at the time of such withdrawal, as stated in the preceding section, valid homestead claims existed upon any lands within the limits of any such grants which afterwards were abandoned, and, under the decisions and rulings of the land department, were re-entered by homestead claimants who have complied with the laws governing homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

19 Stat. 35, 36.

§ 167. *Homestead Entries Made after Expiration of Land Grant Confirmed.*—All such homestead entries which may have been made by permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such a claim to a patent therefor.

19 Stat. 35, 36.

CHAPTER XI.

PRE-EMPTION.

- § 168. What Lands Subject to.
- § 169. Who Entitled to Pre-empt.
- § 170. Affidavit of Claimant.
- § 171. Notice of Intention and Publication thereof.
- § 172. Proof of Settlement and Improvement.
- § 173. Contests.
- § 174. Notice of Contest—What to Contain.
- § 176. Jurisdiction of Courts and Land Offices.
- § 177. Vested Rights.
- § 185. Transmutation.
- § 186. School Section.
- § 187. On Offered and Unoffered Lands.
- § 189. On Surveyed and Unsurveyed Lands.
- § 190. Death of Settler.
- § 191. Insane Persons.

§ 168. *Lands Subject to.*—All lands belonging to the United States, to which the Indian title has been or may be extinguished, are subject to the right of pre-emption, except: 1. Lands included in any reservation, by any treaty, law, or proclamation of the president for any purpose; 2. Lands included within the limits of any incorporated town, or selected as a site of a city or town; 3. Lands actually settled and occupied, for purposes of trade or business, and not for agriculture; 4. Lands on which are situated any known salines or mines.

R. S. 2257, 2258.

§ 169. *Persons Entitled to Pre-empt.*—Every person being the head of a family, or widow, or single person, over the age of 21 years, and a citizen of the United States, or having filed a declaration to become such, as required by the naturalization laws, who has made or hereafter makes a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is entitled to enter and pre-empt such land.

R. S. 2259.

Persons Who can not Pre-empt.—No person who is the proprietor of 320 acres of land in any state or territory, and no person who quits or abandons his residence on his own land to

reside on the public lands in the same state or territory, and no person who has had the benefit of one pre-emption right, and no person who has previously filed his declaration of intention to claim the benefits of the pre-emption laws for another and different tract of land from that which he now seeks to file upon and enter, can acquire any right of pre-emption under the provisions of the pre-emption laws.

R. S. 2260, 2261.

§ 170. *Affidavit*.—Before any person claiming the benefit of the pre-emption laws can be allowed to enter lands he must make oath before the register or receiver of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under the laws of the United States; that he is not the owner of 320 acres of land in any state or territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself.

R. S. 2262.

§ 171. *Notice of Intention*.—Before final proof can be submitted by any person claiming to enter agricultural lands under the law providing for pre-emption entries, such person must file with the register of the proper land office a notice of his or her intention to make such proof, stating therein a description of the lands to be entered, and the names of the witnesses by whom the necessary facts will be established.

20 Stat. 472.

Upon the filing of the notice required by the preceding section, the register must publish a notice that such application has been made once a week for a period of thirty days in a newspaper to be by him designated as published nearest such land, and he shall also post such notice in some conspicuous place in his office for the same period. This notice must also contain the names of the witnesses as stated in the application.

20 Stat. 472.

§ 172. *Settlement and Improvement*.—Prior to any entry being made under or by virtue of any of the aforesaid sections, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land

district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the interior, and all assignments and transfers of the right thereby secured prior to the issue of the patent are null and void.

R. S. 2363; see Homesteads, sec.

§ 173. *Contests*.—When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provisions of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated.

R. S. 2273.

§ 174. *Notice*.—The act of June 8, 1878, in relation to contests, contains but one section, and reads as follows: "The notices of contest now provided by law under the homestead, pre-emption, and timber-culture laws of the United States shall, after the passage of this act, be printed in some newspaper printed in the county where the land in contest lies, and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land."

20 Stat. 91.

Notice of Contest.—Notice must also be given to the opposing party (who made settlement or entry), of the time and place where the contest will be heard. This notice should state the issues to be tried, and should, as far as reasonably possible, give the party to whom it issues specific information of the charges against him, or the nature of the claim set up in opposition to his, so that he may be able to present evidence to meet it. A simple notice of the hearing is wholly insufficient, and no decision based upon such notice can stand.

Watts v. R. R. Co., Copp's L. L., vol. 2, p. 863; see Homestead Contests; see also 1 Copp's L. L., 1882, p. 612.

§ 175. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption entry, he must be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter such lands.

21 Stat. 140.

§ 176. *Jurisdiction*.—The supreme court of the United States have decided that the land department is a tribunal appointed

by congress to decide contests for the right to enter a tract of land between rival claimants; and when finally decided by the officers of that department, the decision is conclusive everywhere else as regards all questions of fact. Where fraud or imposition has been practiced by the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, or to review the weight which these officers attached to such evidence.

Baldwin v. Stark, 2 Supreme Court Reporter, 473.

And where proof has been taken and a decision made in favor of the claimant, and the money paid, no selection of lands under a subsequent act of congress can impair the right of a pre-emptor thus acquired.

Little v. State of Arkansas, 9 How. 315; Bernard's Heirs v. Ashley, 18 How. 43.

But a mere settlement upon lands of the United States, with a declared intention to obtain title to the same under the pre-emption laws, does not give a party such a vested interest in the property as to deprive congress of the power to divest it by a grant to another party.

Yosemite Valley Case; Hutching v. Low, 15 Wall. 77.

§ 177. *Vested Rights*.—Even occupation and improvement on the public lands, with a view to pre-emption, do not confer a vested right in the land so occupied. But they do confer a preference over others in the purchase of such lands by the *bona fide* settler which will enable him to protect his possession against all individuals, and which the land officers are bound to respect.

Frisbey v. Whitney, 9 Wall. 187.

§ 178. The officers of the government are the agents of the law. They can not act beyond its provisions, nor make compromises not sanctioned by it. For this reason, under a law which declares that floats (New Madrid locations) should be so located as not to interfere with other settlers having a right of preference, it has been held, "that where they were so located as to interfere, the location was void, and the patents which followed were also void."

Cunningham v. Ashley, 14 How. 377.

Unless forbidden by some positive law, contracts made by

actual settlers on the public lands, concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract.

Lamb v. Davenport, 18 Wall. 307.

§ 179. A declaratory statement must show that the applicant is not the owner of 320 acres of land in any state or territory of the United States. Where land has been surveyed and opened to entry in the land office of the district, it may be that a qualified pre-emptor may dispossess a prior unqualified occupant; but it is doubtful whether, until survey and entry, he can assert, as against the prior occupant, any right to settle upon the land.

Gimmy v. Culverson, 5 Saw. 607.

Where the house of the pre-emptor is built on the line dividing two quarter-sections, his residence in it avails as the foundation of pre-emption right in either quarter-section.

Lindsey v. Hawes, 2 Black, 554.

Courts of equity will enforce pre-emption rights where all the requirements of the law have been complied with.

Garland v. Winn, 20 How. 7; *Hughes v. United States*, 4 Wall. 233.

Under the pre-emption laws the head of a family means the actual living head of a family. A deserted wife, or one whose husband is a confirmed drunkard, may be the head of a family.

Copp's L. L., 1882, p. 530.

§ 180. Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of an alien's former title. The provisions of the treaty of Guadalupe Hidalgo in reference to citizenship did not include the subjects of other governments resident in Mexico, but related to Mexicans exclusively.

Copp's L. L., 532, 533.

§ 181. A joint entry may be allowed conflicting claimants. A party who has made an entry on public lands under the homestead laws can not again, while the right of entry or the title remains in him, avail himself of the privilege of the pre-emption laws.

R. S. 2260; *Copp's L. L.*, pp. 538, 539.

A settlement consists in the performance of some act by the settler in pursuance of an intention to claim the benefit of the pre-emption laws.

Copp's L. L., 1882, p. 540.

No person can gain priority of right to enter land by reason of an unlawful possession.

Atherton v. Fowler, 96 U. S. 513.

But under peculiar circumstances land in dispute may be divided between two claimants to secure to each his principal improvements.

Copp's L. L., 1882, p. 546.

All right of pre-emption existing in any person on land in a township offered at public sale is extinguished on the day appointed for the commencement of the sales if not asserted prior to the date of sale. Lands designated as mineral, but actually agricultural in character, are only subject to pre-emption after segregation from mineral lands by the secretary of the interior.

Copp's L. L., 1882, p. 554.

§ 182. Secretary Schurz comments on the two cases of Atherton v. Fowler and Hosmer v. Wallace, 7 Otto, 575, and holds that the illegal possession of a tract of land can not defeat the entry thereof by a qualified person, who has complied with law in every regard except the intrusion upon the possession of another.

Copp's L. L., 1882, p. 563.

Further consideration of the case of Atherton v. Fowler has led to a modification of the ruling in that case and in Clow v. Patterson.

Mollynow v. Young, Copp's L. O., Oct. 1880, and Powers v. Forbes, Hill's Leading Cases, Jan. 1881.

In the absence of adverse rights a party may file a second declaratory statement for the same tract.

Copp's L. L., p. 581.

The law requires the settler to make a permanent home on the land sought to be entered.

Copp's L. L., p. 596.

A mortgage of land filed upon by a pre-emptor, and outstanding at date of his entry, defeats his right.

Copp's L. L., p. 582.

The provision of the tenth section of the act of 1841, that no person who shall quit or abandon his residence on his own land to reside on the public land in the same state or territory shall acquire any right of pre-emption under this act, is held to extend only to residents on agricultural lands, and does not de-

bar a pre-emptor who moves from his own dwelling-house in a town or village upon a pre-emption claim.

Copp's L. L., p. 589.

§ 183. The rule requiring six months' residence should not in all cases be enforced, but two months' residence is not sufficient to entitle a claimant to make entry. A claimant can not set up his imprisonment as an excuse for failure to comply with the requirements of the law. Lawful imprisonment is not legal duress.

Copp's L. L., p. 594.

The pre-emptor's affidavit must be taken before one of the local officers.

Copp's L. L., p. 602.

Because a party failed to submit proof and make payment within the time prescribed, he should not be subjected to forfeiture, unless a valid adverse interest has attached.

Copp's L. L., p. 604.

The second section of the act of March 3, 1843, gives to the executor, administrator, or one of the heirs the absolute right to complete the necessary proceedings for acquisition of title, in case of a deceased pre-emption claimant.

Copp's L. L., p. 610.

Notice of hearing by mail is not sufficient. When personal notice is impossible or inexpedient for satisfactory reasons, the party should be notified by publication.

Copp's L. L., p. 612.

§ 184. A quitclaim deed does not estop the grantor from asserting his subsequently acquired title, but a settler who has conveyed the land by warranty deed can not make a valid pre-emption entry thereon.

Copp's L. L., p. 619.

§ 185. *Transmutation.*—The right to transmute to a homestead belongs only to the party filing. A widow can not transmute her late husband's filing, nor make a homestead on the same tract, until it appears that the heirs do not intend to prove up.

Copp's L. L., p. 626.

§ 186. *School Section.*—Where settlement and improvement by a pre-emptor are found to exist on a school section at the time of the survey, the right of the state to the land is gone, if the pre-emptor perfects his right, and in lieu of it the state has the right to select other land.

Sherman v. Buick, 93 U. S. 209.

And in a later case, *Water and Mg. Co. v. Bugbey*, 96 U. S. 165, it is decided that where a settler on these lands abandons his claim to the same, the title of the state becomes absolute, as of the date of the survey.

The right of the state to make selections of school lands only attaches when the final survey of the grant is made, and the commissioner of the general land office approves that survey.

The approval of the secretary of the interior should not be held to relate back to the date of the selection, to the prejudice of adverse claims.

Copp's L. L., p. 635.

§ 187. *Pre-emptions, when and how Admitted.*—Pre-emptions are admitted under sections 2257 to 2288 of the revised statutes of the United States, upon "offered" and "unoffered" lands, and upon any of the unsurveyed lands belonging to the United States, to which the Indian title is extinguished, although in the case of unsurveyed lands no definitive proceedings can be had as to the completion of the title until after the surveys shall have been extended and officially returned to the district land office.

The pre-emption privilege is restricted to heads of families, widows, or single persons over the age of twenty-one, who are citizens of the United States, or who have declared their intention to become citizens, as required by the naturalization laws. This does not include Indians, except such as have ceased their tribal relations, and been declared citizens by treaties or acts of congress.

The right of pre-emption, formerly extended by act of congress of March, 3 1853, for one quarter-section, or 160 acres, at the price of \$2.50 per acre, to the alternate or reserved sections along the line of railroads, is continued by the revised statutes, sections 2257, 2259, and 2279.

§ 188. Section 2281 thereof protects the right of settlers on sections along the line of railroads where settlement existed, prior to withdrawal, and in such cases allows the land to be taken by pre-emptors at \$1.25 per acre, but requires that they shall file the proper notices of their claims and make proof and payment as in other cases.

Where the tract is "offered" land, the party must file with the district land office, his declaratory statement as to the fact of his settlement within thirty days from the date of said settlement, and within one year from the date of settlement must appear before the register and receiver and make proof of his actual

residence on and cultivation of the tract, and secure the same by paying *cash*, or locating thereon military bounty land warrants or agricultural college scrip, according to law; or private claim scrip may now be used, under act of congress of January 28, 1879.

§ 189. *Surveyed but not Offered*.—Where the tract has been surveyed and *not* offered at public sale, the claimant must file his declaratory statement within three months from date of settlement, and make proof and payment within thirty months after the expiration of the three months allowed for filing his declaratory notice, or, in other words, within thirty-three months from the date of settlement.

Where settlements are made on *unsurveyed* lands, settlers are required, within three months after the date of the receipt at the district land office of the approved plat of the township embracing their claims, to file their declaratory statement with the register of the proper land office, and thereafter to make proof and payment for the tract within thirty months from the expiration of said three months.

The pre-emption filings provided for as above may be relinquished by the claimants in writing before the register or receiver of the proper district land office, or the relinquishment may be executed by the claimant on the back of the declaratory statement receipt, duly witnessed and acknowledged in the manner requisite under the laws of the state or territory in which the land is situated for the transfer of real estate. After relinquishment filed in the district land office, the tract embraced in the filing will be held subject to the claim of any other settler, according to the first section, act of May 14, 1880. If the receipt is lost, or from any other cause can not be produced, the relinquishment must be accompanied by the affidavit of the party showing the fact.

When two or more settlers on unsurveyed land are found upon survey to be residing upon or to have valuable improvements upon the same smallest legal subdivision, they may make joint entry of such tract, and separate entries of the residue of their claims. This joint entry may be made in pursuance of contract between the parties, or without it.

. R. S. 2274.

§ 190. *Death of Settler*.—Should the settler in either of the aforesaid cases die before establishing his claim within the period limited by law, the title may be perfected by the executor, administrator, or one of the heirs, by making the requisite

proof of settlement and paying for the land, the entry to be made in the name of "the heirs" of the deceased settler, and the patent will be issued accordingly. The legal representatives of the deceased pre-emptor are entitled to make the entry at any time within the period during which the pre-emptor would have been entitled to do so had he lived.

Section 2261 of the revised statutes prohibits the second filing of a declaratory statement by any pre-emptor qualified at the date of his first filing, where said filing has been in all respects legal. Where the first filing, however, is illegal from any cause, not the willful act of the party, he has the right to make a second and legal filing.

§ 191. *Insane Persons.*—Provision is made by the act of congress of June 8, 1880, whereby the rights of pre-emption claimants becoming insane may be proved up, and their claims perfected by any person duly authorized to act for them during their disability.

1. Such claims must have been initiated in full compliance with law, by persons who were citizens or had declared their intention to become citizens, and were in other respects duly qualified.

2. The party for whose benefit the act shall be invoked must have become insane subsequent to the initiation of his claim, and the act will not be construed to cure a failure to comply with the law, when such failure occurred prior to such insanity.

3. Claimant must have complied with the law up to the time of becoming insane, and proof of compliance will be required to cover only the period prior to such insanity.

4. The final proof must be made by a party whose authority to act for the insane person during such disability shall be duly certified under seal of the proper probate court.

Before final proof is made on pre-emption claims and entries allowed, it is necessary that public notice be given under the act of congress of March 3, 1879, as pointed out with regard to homestead claims; and parties interested in the issue of pre-emption and other patents are further advised that, in a decision of the honorable assistant secretary of the interior, of July 27, 1880, in the case of Horace Whitaker ex rel. Nathan H. Garretson v. The Southern Pacific Railroad Company and Wesley M. Slater, the following instructions are promulgated for the government of this office:

Not Assignable.—"I think it is not a correct practice to issue a pre-emption patent to an assignee in any case. The law

as to the issuance of patents is well stated in the case of *McGarrahan v. New Idria Co.*, 49 Cal. 335, thus: 'Neither the president, however, nor any officer, has other power * * * to sign or to cause the seal of the land office to be affixed to patents than such as is conferred by statute of the United States.' See also *Stoddard v. Chambers*, 2 How. 318; *McGarrahan v. Mining Co.*, *supra*; sections 450 and 453 of the revised statutes; and act of June 19, 1878 (20 Stat. 183). I find nothing in the pre-emption law requiring the issuance of patents to assignees of pre-emptors, and the labor of examining into assignments ought not to be assumed by your office, to say nothing of the evils that may result from issuing patents to assignees in pre-emption cases. The same doctrine applies to all cases of the issuance of patents except where the statutes expressly recognize the right of an assignee to take patent in his own name."

Circular of October 1, 1880.

CHAPTER XII.

PRE-EMPTION.

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- § 225. Lands within Railroad Grants Re-entered after Abandonment.
- § 226. Entries Made after Expiration of Land Grants.
- § 227. Where Claimant of Entry becomes Register or Receiver.
- § 228. Right of Transfer of Settlers under Homestead and Pre-emption Laws for Certain Public Purposes.
- § 229. Public Sales of Land not to be Delayed by Pre-emption Claims.

§ 192. *Lands Subject to Pre-emption.*—All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption under the conditions, restrictions, and stipulations provided by law.

12 Stat. 413; 18 Id. 18, 334; 19 Id. 35; R. S. 2257.

§ 193. *Lands not Subject to Pre-emption.*—The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit:

1. Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.
2. Lands included within the limits of any incorporated town, or selected as the site of a city or town.
3. Lands actually settled and occupied for purposes of trade and business, and not for agriculture.
4. Lands on which are situated any known salines or mines.

5 Stat. 455; 19 Id. 221; R. S. 2258.

§ 194. *Persons Entitled to Pre-emption.*—Every person, being the head of a family, or widow, or single person over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land.

5 Stat. 455; 18 Id. 194, 294, 334; 19 Id. 35, 404, 405; R. S. 2259.

§ 195. *Persons not Entitled to Pre-emption.*—The following classes of persons, unless otherwise specially provided for by law, shall not acquire any right of pre-emption under the provisions of the preceding section, to wit:

1. No person who is the proprietor of three hundred and twenty acres of land in any state or territory.

2. No person who quits or abandons his residence on his own land to reside on the public lands in the same state or territory.

5 Stat. 455; R. S. 2260.

§ 196. *Limitation of Pre-emption Right.*—No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259 R. S.; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract.

5 Stat. 455, 620; R. S. 2261.

§ 197. *Oath of Pre-emptionist, where Filed; Penalty.*—Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section 2259 R. S.; that he is not the owner of three hundred and twenty acres of land in any state or territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void, except as provided in section 2288 R. S. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the general land office, either of which shall be good and sufficient evidence that such oath was administered according to law.

The affidavit required by this section may be made before the clerk of the county court or of any court of record, of the county and state, or district and territory, in which the lands are situated; and if the lands are situated in any unorganized county, the affidavit may be made in a similar manner in any adjacent county in said state or territory, and the affidavit so made and

duly subscribed shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such clerk of the court to the register and receiver, with the fee and charges allowed by law.

5 Stat. 456; Act of June 9, 1880; R. S. 2262.

§ 198. *Notice of Intention to Make Final Proof.*—That before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for pre-emption entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established.

20 Stat. 472.

§ 199. *Publication of Notice of Entry.*—Upon the filing of the notice required by the preceding section the register shall publish a notice, that such application has been made, once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days the claimant shall be entitled to make proof in the manner provided by law. The secretary of the interior shall make all necessary rules for giving effect to the foregoing provisions.

20 Stat. 472.

§ 200. *Proof of Settlement; Assignment of Pre-emption Rights.* Prior to any entries being made under and by virtue of the provisions of section 2259 R. S., proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.

5 Stat. 456; R. S. 2263.

§ 201. *Claim Filed by Settler on Land not Proclaimed for Sale.* Every claimant under the pre-emption law for land not yet proclaimed for sale, is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim

shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

5 Stat. 620; R. S. 2265.

§ 202. *Statement to be Filed by Settler with Intent to Purchase, on Lands Subject to Private Entry.*—When any person settles or improves a tract of land, subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

5 Stat. 457; R. S. 2264.

§ 203. *Declaratory Statement of Settlers on Unsurveyed Lands, when Filed.*—In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.

12 Stat. 410; R. S. 2266.

§ 204. *Pre-emption Claimants; Time of making Proof and Payment.*—All claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notices, has expired.

16 Stat. 279, 604; 18 Id. 52, 81; 19 Id. 55; R. S. 2267.

§ 205. *Lands Relinquished by Pre-emptor Subject to Entry at Once.*—When a pre-emption claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held open to settlement and entry without further action on the part of the commissioner of the general land office.

Act of May 14, 1880.

§ 206. *Party Contesting Pre-emption Entry to be Allowed Thirty Days after Notice of Cancellation to Make Entry.*—In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter such lands; and the register shall be entitled to a fee of one dollar for giving such notice, to be paid by the contestant, and not to be reported.

Act of May 14, 1880.

§ 207. *Publication of Notices of Contest in Pre-emption Cases.* The notices of contest provided by law under the pre-emption laws shall be printed in some newspaper printed in the county where the land in contest lies; and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land.

20 Stat. 91; 14 Op. Att. Gen. 601.

§ 208. *Extension of Time in Certain Cases to Persons in Military and Naval Service.*—Where a pre-emptor has taken the initiatory steps required by law in regard to actual settlement, and is called away from such settlement by being engaged in the military or naval service of the United States, and by reason of such absence is unable to appear at the district land office to make before the register or receiver the affidavit, proof, and payment, respectively, required by the preceding provisions of this chapter, the time for filing such affidavit and making final proof and entry or location shall be extended six months after the expiration of his term of service, upon satisfactory proof by affidavit, or the testimony of witnesses, that such pre-emptor is so in the service, being filed with the register of the land office for the district in which his settlement is made.

13 Stat. 35; R. S. 2268.

§ 209. *Death before Consummating Claim; Who to Complete, etc.*—Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.

5 Stat. 620; R. S. 2269.

§ 210. *Pre-emption Entries of Insane Persons Confirmed in Certain Cases.*—In all cases in which parties who regularly initiated claims to public lands as settlers thereon, according to the provisions of the pre-emption laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the commissioner of the general land office that the parties complied in good faith with the legal requirements up to the time of becoming insane.

Act of June 8, 1880.

§ 211. *Non-compliance with Laws caused by Vacancy in Office of Register or Receiver not to Affect, etc.*—Whenever the vacancy of the office, either of register or receiver, or of both, renders it impossible for the claimant to comply with any requisition of the pre-emption laws within the appointed time, such vacancy shall not operate to the detriment of the party claiming, in respect to any matter essential to the establishment of his claim; but such requisition must be complied with within the same period after the disability is removed as would have been allowed had such disability not existed.

5 Stat. 620; R. S. 2270.

§ 212. *No Pre-emption of Lands Sold but not Confirmed by Land Office.*—The provisions of this chapter shall be so construed as not to confer on any one a right of pre-emption, by reason of a settlement made on a tract theretofore disposed of, when such disposal has not been confirmed by the general land office on account of any alleged defect therein.

5 Stat. 534; R. S. 2271.

§ 213. *Purchase by Private Entry after Expiration of Pre-emption Right.*—Nothing in the provisions of this chapter shall be construed to preclude any person, who may have filed a notice of intention to claim any tract of land by pre-emption, from the right allowed by law to others to purchase such tract by private entry after the expiration of the right of pre-emption.

5 Stat. 621; R. S. 2272.

§ 214. *When More than One Settler, Rights of; Appeals to*

Commissioner and Secretary of Interior.—When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provisions of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of pre-emption, shall be made to the commissioner of the general land office, whose decision shall be final, unless appeal therefrom be taken to the secretary of the interior.

5 Stat. 456; 11 Id. 326; R. S. 2273.

§ 215. *Settlements of Two or More Persons on Same Subdivision before Survey.*—When settlements have been made upon agricultural public lands of the United States, prior to the survey thereof, and it has been or shall be ascertained, after the public surveys have been extended over such lands, that two or more settlers have improvements upon the same legal subdivision, it shall be lawful for such settlers to make joint entry of their lands at the local land office, or for either of said settlers to enter into contract with his co-settlers to convey to them their portion of said land after a patent is issued to him, and, after making said contract, to file a declaratory statement in his own name, and prove up and pay for said land, and proof of joint occupation by himself and others, and of such contract with them made, shall be equivalent to proof of sole occupation and pre-emption by the applicant; *provided*, that in no case shall the amount patented under this section exceed 160 acres, nor shall this section apply to lands not subject to homestead or pre-emption entry.

17 Stat. 609; R. S. 2274.

§ 216. *Settlements before Survey on Sections 16 or 36, Deficiencies thereof.*—Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections 16 or 36 are frac-

tional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

11 Stat. 385; 18 Id. 202; R. S. 2275.

§ 217. *Selections to Supply Deficiencies of School Lands.*—The lands appropriated by the preceding section shall be selected, within the same land district, in accordance with the following principles of adjustment: For each township, or fractional township, containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one half and not more than three quarters of a township, three quarters of a section; for a fractional township containing a greater quantity of land than one quarter and not more than one half of a township, one half-section; and for a fractional township containing a greater quantity of land than one entire section and not more than one quarter of a township, one quarter-section of land.

4 Stat. 179; 11 Id. 385; 18 Id. 202; R. S. 2276.

§ 218. *Military Bounty Land Warrants Receivable for Pre-emption Payments.*—All warrants for military bounty lands, which are issued under any law of the United States, shall be received in payment of pre-emption rights at the rate of \$1.25 per acre, for the quantity of land therein specified; but where the land is rated at \$1.25 cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

10 Stat. 3; R. S. 2277.

§ 219. *Agricultural-college Scrip Receivable in Payment of Pre-emptions.*—Agricultural-college scrip, issued to any state under the act approved July 2, 1862, or acts amendatory thereof, shall be received from actual settlers in payment of pre-emption claims in the same manner and to the same extent as authorized in case of military bounty land warrants, by the preceding section.

16 Stat. 186; R. S. 2278.

§ 220. *Pre-emption Limit along Railroad Lines.*—No person shall have the right of pre-emption to more than 160 acres along the line of railroads within the limits granted by any act of congress.

10 Stat. 244; 18 Id. 519; R. S. 2279.

§ 221. *Pre-emption Rights on Lands Reserved for Grants Found Invalid.*—Any settler on lands heretofore reserved on account

of claims under French, Spanish, or other grants, which have been or may be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by the preceding provisions of this chapter, after the lands have been released from reservation, in the same manner as if no reservation had existed.

10 Stat. 244; R. S. 2280.

§ 222. *Pre-emption Rights on Lands Reserved for Railroads.*—All settlers on public lands, which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them; but they shall file the proper notices of their claims, and make proof and payment as in other cases.

10 Stat. 269; 16 Id. 279; 18 Id. 519; R. S. 2281.

§ 223. *Right of Additional Location by Pre-emptors within Limits of Forfeited Railroad Grants.*—Where any actual settler, who shall have paid for any lands situate within the limits of any grant of lands by congress to aid in the construction of any railroad, the price of such lands being fixed by law at double-minimum rates, and such railroad lands having been forfeited to the United States, and restored to the public domain for failure to build such railroad, such person or persons shall have the right to locate, on any unoccupied lands, an amount equal to their original entry, without further cost, except such fees as are now provided by law in pre-emption cases; but when such location is made upon double-minimum lands, one half the amount only shall be taken.

18 Stat. 519.

§ 224. *Confirmation of Pre-emption Entries within Railroad Limits Made Prior to Receipt of Notice of Withdrawal at Local Office.*—All pre-emption entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than 160 acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the pre-emption laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or

parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

19 Stat. 35.

§ 225. *Lands within Railroad Grants Re-entered after Abandonment.*—When, at the time of the withdrawal, as stated in the preceding section, valid pre-emption claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the land department, were re-entered by pre-emption claimants who had complied with the laws governing pre-emption entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

19 Stat. 35.

§ 226. *Entries Made after Expiration of Land Grants.*—All such pre-emption entries which may have been made by permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such a claim to a patent therefor.

19 Stat. 35.

§ 227. *Where Claimant of Entry Becomes Register or Receiver.* Any bona fide settler under the homestead or pre-emption laws of the United States, who has filed the proper application to enter, not to exceed one quarter-section of the public lands in any district land office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the pre-emption laws by furnishing the proofs and making the payments required by law, to the satisfaction of the commissioner of the general land office.

17 Stat. 10; R. S. 2287.

§ 228. *Right of Transfer of Settlers under Homestead or Pre-emption Laws for Certain Public Purposes.*—Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate

the right to complete and perfect the title to his or their pre-
emptions or homesteads.

17 Stat. 602; R. S. 2288.

§ 229. *Sale of Land not to be Delayed, etc.*—Nothing con-
tained in this chapter shall delay the sale of any of the public
lands beyond the time appointed by the proclamation of the
president.

5 Stat. 457; R. S. 2282.

CHAPTER XIII. TIMBER CULTURE.

- § 230. Demands for the Law.
- § 231. Entries how Made.
- § 232. Notice and Publication.
- § 233. What Kinds of Lands may be Entered.
- § 234. Married Women.
- § 236. Contests as in Homestead Cases.
- § 237. Construction.
- § 238. Abandonment and Forfeiture.
- § 239. Heirs, Administrators, etc.
- § 240. School Lands.
- § 242. One Entry Only Allowed.
- § 245. Classes of Trees Recognized.
- § 246. Contests as in Homestead Cases.
- § 247. Additional Land.
- § 248. Act of June 14, 1878.
- § 249. Proceedings in Contest.
- § 250. Stone and Timber Lands—Mode of Procedure.
- § 251. Notice and Publication.

§ 230. *Demands for the Law.*—The attention of congress was early called to the necessity of legislation on the treeless public domain of the west. Many of the western states, Kansas as an illustration, began, under the authority of law, a system of bounties for tree-planting. By local usage and consent of the people, a day was set apart upon which a festival was held and all planted trees; this became a holiday. Planting groves of trees became the method of providing wind-breaks against the fierce winds of the plains.

The lack of fuel was the principal inducement, coupled with the belief that forest trees cause an increased rain-fall, and knowledge of the fact that wooded countries retain moisture much longer than treeless plains, and give a more equal and beneficial distribution of water.

Government aid was solicited; agricultural, horticultural, arboricultural societies petitioned; state legislatures took action; and timber culture became a subject of general discussion in the west.

The two timber-culture acts were passed June 3 and June 14, 1878.

20 Stat. pp. 89, 113.

§ 231. *How Entered.*—Surveyed lands in California, Oregon, Nevada, and the territory of Washington, not yet proclaimed and offered for sale, valuable chiefly for timber and stone, unfit for cultivation, and consequently for disposition under the homestead and pre-emption laws, may be entered under the first, second, and third sections of the act of congress of June 3, 1878. The quantity is limited to 160 acres to any one person, and the price is fixed at \$2.50 per acre. The applicant must be a citizen, or have declared his intention to become such. He must make affidavit as to his citizenship, and produce evidence of the fact; also a sworn statement designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that it is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited, contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to applicant, nor as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself. The statement must be verified by the applicant before the register or receiver of the land office of the district.

§ 232. *Notice and Publication.*—A notice of the application describing the land must be posted in the office of the register for sixty days, and must be published by the applicant for sixty days in a newspaper published nearest the location of the premises for the same length of time. At the expiration of that time proof of the publication of the notice and of the character and condition of the land, as set forth in the sworn statement, must be made, after which, if no objection appear, the entry will be allowed. The character and condition of the land must be shown by the affidavits of disinterested witnesses taken before the register or receiver, or any officer using a seal, and authorized to administer oaths in the land district in which the land lies.

§ 233. *What Kinds of Lands may be Entered.*—Prairie lands or other lands devoid of timber are subject to the operations of

the timber-culture laws. Unless the land is naturally devoid of timber, it can not be entered under these laws. Where the timber has been cut off, the land is not subject to such entry. If saplings or young timber are found growing on the land, it can not be entered for timber culture. But it is only such trees as are valuable for timber that excludes the tract; willows, cottonwood, and other trees out of which timber can not be manufactured, do not prevent an entry under the act. Land through which passes a stream of water, upon the banks of which is a growth of scrub timber, is subject to entry under these laws if there is no other timber on the land.

Copp's L. L., 1882, pp. 642, 646, 673.

Where a natural growth of timber is scattered over 80 acres of a quarter-section, and the trees vary from 6 to 30 inches in diameter, such tract is not subject to timber-culture entry.

Copp's L. L., 1882, p. 172.

§ 234. *Married Women*.—A married woman can not acquire title to public land under the timber-culture act of June 14, 1878. But if a single woman, after making and forwarding the required affidavit and application to make timber-culture entry, marries before the timber entry is completed at the local land office, such entry will be legal, and, if the law is fully complied with in other respects, she will be entitled to a patent.

§ 235. The filing of the application and affidavit, with payment of fees, is a prerequisite to the allowance of a timber-culture entry, and he who first complies with the conditions obtains priority of right. A prior verbal application, unaccompanied by the written application, etc., gives no preference right, as it is not the duty of the local officers to prepare the necessary papers.

Copp's L. L., 1882, p. 653.

There can be but one timber-culture entry on the same tract at the same time. A strict compliance with the requirements of the law in the matter of breaking, cultivating, etc., is required. And where timber-culture improvements were on the land prior to the entry thereof under the statute, such improvements must not be credited to the party making the entry; and in case of contests, the affidavit should contain specific charges.

Copp's L. L., 1882, p. 658.

The heirs or legal representatives of a deceased party, who had made a timber-culture entry, may continue the culture of

the trees, and on compliance with the law receive a patent for the land. Breaking and planting can be done by an agent.

Copp's L. L., 1882, p. 677.

A pre-emptor's right to land attaches from the date of settlement; a timber-culture claimant's from the date of entry at the local office.

Where there is both a pre-emption and timber-culture claimant for the same tract, the timber-culture claimant may present to the local officers his affidavit calling in question the alleged date of the pre-emptor's settlement, and asking that a hearing be ordered to determine the respective rights of the parties in interest.

§ 236. *Contests.*—In contests in timber-culture entries, the required affidavit must be filed, and the published notice must be properly prepared.

Abandonment is not a ground of contest. Non-compliance with the law is the only basis of procedure under the act.

Copp's L. L., 1882, pp. 692, 703.

Section 3 of the timber-culture act of June 14, 1878, restricts contests against a prior timber-culture entry to one who seeks to enter the land covered thereby under the homestead and timber-culture laws, and in the absence of such application to make entry, there is no right of contest; nor does a preference right attach under section 2 of the act of May 14, 1880.

Copp's L. O., April, 1883, p. 9.

An affidavit to procure a publication of notice must show diligence, and in what the diligence consisted, to ascertain the residence of the defendant; in other words, the affidavit should be essentially the same as in courts. Where there is no appearance by either party, the case should be dismissed.

Copp's L. O., March, 1883, p. 230.

A contestant must show himself qualified to make an entry; and he can not shorten the thirty days' period of reservation by withdrawing or relinquishing his preference right.

Copp's L. O., May, 1883, p. 42.

Where a timber-culture entry is relinquished after the initiation of a contest, the party who filed his application to enter in the event of cancellation will be allowed to do so upon receipt of notice of cancellation at the local office. No patent can be issued on a timber-culture entry until after the expiration of eight years of compliance with the law.

Copp's L. O., May, 1883, p. 688.

Where a party who has made a timber-culture entry fails to do the breaking required by the act of March 13, 1874, within one year, his entry should be canceled upon satisfactory proof of such failure.

Copp's L. O., May, 1883, p. 698.

In contests, if the first entry is relinquished pending the trial, or for any other reason than non-compliance with the law, the contestant acquires no preference right.

Copp's L. O., May, 1883, p. 700.

A party alleging that a timber-culture entry has been sold and relinquished is entitled to enter contest against the same. One contest is no bar to another by a different party.

Copp's L. O., May, 1883, p. 708.

An application to contest timber-culture entries can only be entertained after the expiration of two years from the date of entry. In contests it is necessary to show not only that the claimant failed to do the breaking, but that he failed also to do the planting; the language of the section is, "breaking and planting."

Copp's L. O., May, 1883, p. 709.

Section 3 of the timber-culture act of June 14, 1878, restricts contests against a prior timber-culture entry to one who seeks to enter the land covered thereby under the homestead or timber-culture laws, and in the absence of such application there is no right of contest, nor does a preference right attach under section 2 of the act of May 14, 1880.

Copp's L. O., Jan. 1883, p. 198.

§ 237. *Construction of the Act of May 14, 1880.*—The case of *Smith v. Oakes* is not in conflict with the case of *John Powers* (Copp's L. O., vol. 8, p. 178), as it was held in the latter case, that in order to give effect to a relinquishment as evidence in a contested case, so as to inure to the benefit of the contestant under the act of May 14, 1880, it must have been made before the closing of the testimony before the register and receiver on the allegation of abandonment.

The first section of the act of May 14, 1880, provides that "when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment in the local land office of his claim, the land covered by such claim shall be held as open to settlement and entry, without further action on the part of the commissioner of the general land office. It would thus appear that rule 53 of practice does violence to the strict letter of the law.

But violence is done the letter in order to give effect to what would seem to be the true intent of the law. It is therefore held, that the summary action enjoined in the first section of the statute above quoted was intended to apply to those cases only where there were no adverse claims pending or unadjusted.

Smith v. Oakes, Copp's L. O., March, 1883, p. 233.

Where an application to enter a tract under the timber-culture laws is pending, a homestead entry will not be allowed.

§ 238. *Abandonment—Forfeiture.*—Where a question of forfeiture arises, the burden of proof is on the party alleging non-compliance with the law. The forfeiture or abandonment must be proved.

Copp's L. O., Dec. 1882, p. 174.

A timber-culture entry in which the claimant fails to do the prescribed planting during the third year is forfeited.

Copp's L. O., vol. 9, p. 27.

The testimony must show that the timber-culture entryman has not complied with the law, and where the trees planted on the first five acres have been destroyed by drought and other causes, the same must be replanted the next succeeding year, together with the breaking and planting of an additional five acres.

Copp's L. O., vol. 9, p. 28.

A season of drought does not excuse the breaking required by the timber-culture laws.

Copp's L. O., vol. 9, p. 79.

The rulings governing timber-culture contests are the same as those governing homesteads. Two contest claims can not be permitted at the same time.

Copp's L. O., vol. 9, p. 64.

The affidavit and application can not be made by an agent. The affidavit must be sworn to by the claimant.

Copp's L. O., vol. 9, p. 64.

The affidavit must be specific to the effect that the party failed to plow or break, or do the planting required by the timber-culture laws; otherwise the contest will be dismissed on the ground that the same does not state facts sufficient to constitute a cause of action.

Copp's L. O., vol. 9, p. 64.

In timber-culture entries the work can be done by the entryman, his agent, or his vendor.

Copp's L. O., vol. 9, p. 63.

§ 239. *Heirs, Administrators, etc.*—A father as heir can complete the entry of a deceased son. The entry of a deceased party can only be relinquished by the heirs or legal representatives. A widow or administrator can alone relinquish when shown to be the sole heir of the deceased. Where the heirs desire to relinquish, each and all of them must be identified; a certificate from the proper probate court being deemed the best evidence upon the point.

Copp's L. O., vol. 2, p. 37.

The question of compliance with the law may be investigated at any time before patent issues. Affidavits of contest should be made specific in their charges as to the particular year or years subsequent to entry in which it is alleged the claimants have failed to comply with the law.

Copp's L. O., vol. 8, p. 77.

§ 240. *School Lands.*—Whenever, at the time the government surveys of sections 16 and 36 of public land in California are made, there is, by the erection of a dwelling-house or by cultivation, a settlement on any portion thereof, whereon some one resides and who asserts title thereto, the title to such portion does not vest in the state, but she has a right to other lands in lieu thereof.

Sherman v. Buick, and Water Co. v. Bugbey, are commented on and explained; *Mining Co. v. Consolidated Mfg. Co.*, 12 Otto, 167.

It is only when covenants are mutual and dependent, or when their performance is made an express condition, that a breach of them involves an avoidance of the contract, and a state can not rescind its grant of swamp land on the ground of its being a violation of the act of congress.

Emigrant Co. v. County of Adams, 10 Otto, 61.

§ 241. A timber-culture entry can not be commuted.

Copp's L. O., vol. 5, p. 92.

If an entryman dies leaving a widow and heirs, the heirs inherit, and not the widow.

Copp's L. O., vol. 4, p. 162.

By section 2461, revised statutes, every person who trespasses upon the public lands by cutting timber trees of any kind therefrom is indictable and punishable by fine and imprisonment.

United States v. Briggs, 9 How. 351.

When trees are cut upon the public domain, their character

is changed from real property to personalty; but the property in them still remains in the United States.

Schulenberg v. Harryman, 21 Wall. 44.

A mortgagee has a right to hold timber severed from the mortgaged land for the purpose of securing the payment of debt.

Hutchings v. King, 1 Wall. 53.

§ 242. *One Entry Only Allowed.*—The timber-culture act of March 3, 1873, having been amended by the act of March 13, 1874, the latter has been further amended by the act of June 14, 1878.

Certain provisions of the act of March 13, 1874, are repealed by the act of June 14, 1878.

1. The act of March 13, 1874, at the close of its first section, contains the following: "*Provided*, that not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act, unless fractional subdivisions of less than forty acres are entered, which, in the aggregate, shall not exceed one quarter-section." In the act of June 14, 1878, the concluding words, "unless fractional subdivisions of less than forty acres are entered, which, in the aggregate, shall not exceed one quarter-section," are omitted. Hence, the rule forbidding more than one entry is made universal, and will govern in all future cases.

§ 243. 2. The provision of the act of March 13, 1874, requiring that the trees shall be not "more than 12 feet apart each way," is omitted from the act of June 14, 1878. The latter requires, however, that the final proof shall show "that not less than 2,700 trees were planted on each acre, and that at the time of making such proof there shall be growing at least 675 living and thrifty trees to each acre."

3. The closing sentence of the second section of the act of March 13, 1874, provides that "in case of the death of a person who has complied with the provisions of this act for the period of three years, his heirs or legal representatives shall have the option to comply with the provisions of this act, and receive, at the expiration of eight years, a patent for 160 acres, or receive, without delay, a patent for 40 acres, relinquishing all claim to the remainder." This provision is not contained in the act of June 14, 1878.

4. The following section of the act of March 13, 1874, rela-

ting to homestead entries on which timber is cultivated, is omitted from the act of June 14, 1878:

"Sec. 4. That each and every person who, under the provisions of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, or any amendment thereto, having a homestead on said public domain, who, at any time after the end of the third year of his or her residence thereon, shall, in addition to the settlement and improvements now required by law, have had under cultivation, for two years, one acre of timber, the trees thereon not being more than twelve feet apart each way, and in a good, thrifty condition, for each and every sixteen acres of said homestead, shall, upon due proof of such fact by two credible witnesses, receive his or her patent for said homestead."

The rights of claimants under entries actually made according to the act of March 13, 1874, before the fourteenth of June, 1878, when the amendatory act took effect, are not affected by the repeal of the provisions referred to. The parties interested, if they so elect, may consummate their entries according to the provisions of the act under which they were initiated. And homestead entries made before the fourteenth of June, 1878, will be patented according to the fourth section above quoted, where the facts are such as to bring the cases within its provisions, and the interested parties so desire.

§ 244. But entries made since that time must be adjusted according to the principles of the law as modified by the amendatory act.

The principal points to be observed in proceedings thereunder may be stated as follows:

1. The privilege of entry under the act of June 14, 1878, is confined to persons who are heads of families, or over twenty-one years of age, and who are citizens of the United States, or have declared their intention to become such, according to the naturalization laws.

2. The affidavit required for initiating an entry under the act of June 14, 1878, may be made before the register or receiver of the district office for the land district embracing the desired tract, before the clerk of some court of record, or before any officer authorized to administer oaths in that district.

3. Not more than 160 acres in any one section can be entered under this act, and no person can make more than one entry thereunder.

4. The ratio of area required to be broken, planted, etc., in

all entries under the act of June 14, 1878, is stated in the statute itself. The party making an entry of a quarter-section, or 160 acres, is required to break or plow five acres covered thereby during the first year, and five acres in addition during the second year. The five acres broken or plowed during the first year he is required to cultivate by raising a crop, or otherwise, during the second year, and to plant in timber, seeds, or cuttings during the third year. The five acres broken or plowed during the second year he is required to cultivate by raising a crop, or otherwise, during the third year, and to plant in timber, seeds, or cuttings during the fourth year. The tracts embraced in entries of a less quantity than one quarter-section are required to be broken or plowed, cultivated, and planted in trees, tree-seeds, or cuttings, during the same periods, and to the same extent, in proportion to their total areas, as are provided for in entries of a quarter-section. Provision is made in the act for an extension of time in case the trees, seeds, or cuttings planted should be destroyed by grasshoppers or by extreme and unusual drought.

§ 245. *Classes of Trees Recognized.*—5. If, at the expiration of eight years from the date of entry, or at any time within five years thereafter, the person making the entry, or, if he be dead, his heirs or legal representatives, shall prove, by two credible witnesses, the planting, cultivating, and protecting of the timber for not less than eight years, according to the provisions of the act of June 14, 1878, he or they will be entitled to a patent for the land embraced in the entry.

The following classes of trees are recognized by this office as timber in the meaning of the law, viz.: Ash, alder, birch, beech, black-walnut, bass-wood, black locust, cedar, chestnut, cotton-wood, elm, fir, including spruce, hickory, honey-locust, larch, maple, including box-elder, oak, pine, plane-tree, otherwise called cotton-tree, button-wood or sycamore, service tree, otherwise called mountain ash, white walnut, otherwise called butter-nut, white willow and white wood, otherwise called tulip tree.

§ 246. *Contests as in Homestead Cases.*—6. If, at any time after one year from the date of entry, and prior to the issue of a patent therefor, the claimant shall fail to comply with any of the legal requirements, then and in that event such entry will become liable to a contest, in the manner provided in homestead cases, and upon due proof of such failure the entry will be canceled, and the land become again subject to entry under

the homestead laws, or by some other person under the act of June 14, 1878.

7. No land acquired under the provisions of the act of June 14, 1878, will in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

8. The fees for entries under the act of June 14, 1878, are \$10 if the tract applied for is more than 80 acres, and \$5 if it is 80 acres or less; and the commissions of registers and receivers on all entries (irrespective of area) are \$4 (\$2 to each), at the date of entry, and a like sum at the date of final proof.

9. No distinction is made, as to area or the amount of fee and commissions, between minimum and double-minimum lands. A party may enter 160 acres of either on payment of the prescribed fee and commissions.

10. The fifth section of the act approved March 3, 1857, entitled "An act in addition to an act to punish crimes against the United States, and for other purposes," is extended to all oaths, affirmations, and affidavits required or authorized by the act of June 14, 1878.

§ 247. *Additional Land.*—Parties who have already made entries under the timber-culture acts of March 3, 1873, and March 13, 1874, of which the act of June 14, 1878, is amendatory, may complete the same by compliance with the requirements of the latter act; that is, they may do so by showing, at the time of making their final proof, that they have had under cultivation, as required by the act of June 14, 1878, an amount of timber sufficient to make the number of acres required thereby, being one fourth the number required by the former acts. It will be sufficient for this if the parties show that of the entire area embraced in their respective entries they have cultivated in timber, for the period required by the act of 1878, an area not less than one sixteenth part, and that they have then growing upon such cultivated area the prescribed number of "living and thrifty trees," viz., 6,750, where the entry is for 160 acres, 3,375 where the entry is for 80 acres, and 1,688 where it is for 40 acres or less.

§ 248. *Act of June 14, 1878.*—The following regulations are prescribed pursuant to the fifth section of the act of June 14, 1878, viz.:

1. The register and receiver will not restrict entries under this act to one quarter-section only in each section, as was formerly done under the acts to which this is amendatory, but

may allow entries to be made of subdivisions of different quarters of the same section; *provided*, that each entry shall form a compact body not exceeding 160 acres, and that not more than that quantity shall be entered in any one section. Before allowing any entry applied for, they will by a careful examination of the plat and tract-books with reference to any previous entry or entries within the limits of the same section, satisfy themselves that the desired entry is admissible under this rule.

2. When they shall have satisfied themselves that the land applied for is properly subject to such entry, they will require the party to make the prescribed affidavit, and to pay the fee and that part of the commissions payable at the date of entry, and the receiver will issue his receipt therefor, in duplicate, giving the party a duplicate receipt. They will number the entry in its order in a separate series of numbers, unless they have already a series under the acts to which this act is amendatory, in which case they will number the entry as one of that series; they will note the entry on their records and report it in their monthly returns, sending up all the papers therein, with an abstract of the entries allowed during the month under this act. If the affidavit is made before a justice of the peace, which the act admits of, his official character and the genuineness of his signature must be certified under seal.

§ 249. *Proceedings on Contest.*—3. When a contest is instituted, as contemplated in the third section of the act of June 14, 1878, the contestant will be allowed to make application to enter the land. The register will thereupon indorse on the application the date of its presentation, and will make the application and the contestant's affidavit, setting forth the grounds of contest, the basis for further proceedings, these papers to accompany the report, submitting the case to the general land office. Should the contest result in the cancellation of the contested entry, the contestant may then perfect his own, but no preference right will be allowed under this section unless application is made by him at date of instituting contest. But reference is here made to the subsequent act of congress approved May 14, 1880, the provisions of which allowing preference rights apply to timber-culture entries as well as to homesteads and pre-emptions.

4. The fees and commissions in this class of entries the receiver will account for in the usual manner, indicating the same as fees and commissions on timber-culture entries, which will

be charged against the maximum of three dollars now allowed by law.

5. In all cases under this act it will be required that trees shall be cultivated which shall be of the classes included in the term "timber," the cultivation of shrubbery and fruit trees not being sufficient. (See classes of trees before mentioned.)

6. The applications, affidavits, and receipts in entries allowed under the act of June 14, 1878, will be made out according to the forms hereto attached, Nos. 4-009, 4-073, and 4-142.

The foregoing portion of this circular has reference to public lands which are agricultural in character. There are special laws for the disposal of desert lands, saline lands, town sites on the public domain, and lands which are unfit for cultivation and valuable chiefly for timber or stone.

Circular of October 1, 1880.

§ 250. *Stone and Timber Lands—Mode of Procedure.*—The first second, and third sections of the act of congress of June 3, 1878, provide for the sale of surveyed lands in California, Oregon, Nevada, and in Washington territory not yet proclaimed and offered at public sale, valuable chiefly for timber and stone, unfit for cultivation, and consequently for disposal under the pre-emption and homestead laws. When a party applies to purchase a tract thereunder, the register and receiver will require him to make affidavit that he is a citizen of the United States by birth or naturalization, or that he has declared his intention to become a citizen under the naturalization laws. If native-born, parol evidence of that fact will be received. If not native-born, record evidence of the prescribed qualification must be furnished. In connection therewith, he will be required to make the sworn statement in duplicate. One of the duplicate statements filed in each is by the act required to be transmitted to this office, and the registers and receivers will accordingly send up with their monthly returns the duplicate statements to be transmitted for the month.

§ 251. *Notice and Publication.*—The evidence in regard to the publication of notice required to be furnished, in the third section of the act, must consist of the affidavit of the publisher, or other person having charge of the newspaper in which the notice is published, with a copy of the notice attached thereto, setting forth the nature of his connection with the paper, and that the notice was duly published for the prescribed period. The evidence required in the same section with regard to the

non-mineral character of the land, and its unoccupied and unimproved condition, must consist of the testimony of at least two disinterested witnesses, to the effect that they know the facts to which they testify, from personal inspection of the land and of each of its smallest legal subdivisions. This testimony may be taken before the register or receiver, or any officer using an official seal and authorized to administer oaths, in the land district in which the land lies. Upon such proof being produced, if no adverse claim shall have been filed, the entry applied for will be allowed in pursuance of the provisions of the act. The receiver will issue his receipt for the purchase money, and the register his certificate of purchase, numbering the entry in the regular cash series. The register and receiver will enter the sale on their books, and make the usual returns therefor to the land office, noting on the monthly abstracts, opposite the entry, and on the entry papers, a reference to the act of congress under which allowed. They will forward all the papers in the case with their returns to the land office, except the retained duplicate statement filed under the second section of the act, to which the register will give the same number with the other papers for the entry, and retain it on the appropriate file, with the formal application, in his office.

The register and receiver will be entitled to a fee of five dollars each for allowing an entry under said act, and jointly at the rate of twenty-two cents and a half per hundred words for testimony reduced by them to writing for claimants, which will be accounted for as other fees.

If, at the expiration of the sixty days' notice provided for in the third section of the act, an adverse claim should be found to exist, calling for an investigation, the register and receiver will allow the parties a hearing according to the rules of practice.

In case of an association of persons making application for such an entry, each of the persons must prove the requisite qualifications, and their names must appear in and be subscribed to the sworn statement, as in case of an individual person. They must also unite in the regular application for entry, which will be made in their joint names, as in other cases of joint cash entry. The forms prescribed for cases of applications by individual persons may be adapted for use in applications of this class.

Circular of October 1, 1880.

CHAPTER XIV.

TIMBER AND TIMBER CULTURE.

- § 252. Timber on Mineral Lands may be Taken for Certain Purposes. Permission to Take not Extended to Railroad Companies.
- § 253. Duty of Register and Receiver to Report Unauthorized Taking.
- § 254. Penalty for Unauthorized Taking.
- § 255. Timber and Stone Lands in California, Oregon, etc., to be Sold.
- § 256. Application for Purchase. False Swearing.
- § 257. Publication of Application. Facts to be Proved. Objections to Patent.
- § 258. Cutting Timber Unlawfully; Penalty.
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- § 260a. Live-oak and Red-cedar Lands.
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- § 263. Cutting or Destruction of Live-oak or Red Cedar; Penalty.
- § 264. Vessels Employed in Carrying Away Live-oak and Red Cedar; Forfeiture of.
- § 265. Clearance of Vessels Laden with Live-oak; Prosecution of Depredators.
- § 266. Secretary of Navy to Ascertain what Reserved Lands not Required for Naval Purposes.
- § 267. Lands not Required, to be Certified to Secretary of Interior, and thereafter to be Subject to Entry and Sale. Preference Right of Purchase for Certain Parties.
- § 268. Cutting or Injuring Trees on Lands of United States Reserved or Purchased for Public Uses; Punishment.
- § 269. Authority to Condone Trespasses Committed Prior to March 1, 1879.
- § 270. Timber-culture Entries. Patents to Issue for Lands Cultivated in Timber at Expiration of Eight Years. Only One Quarter of a Section to be Entered, and but One Entry Allowed.
- § 271. Oath on Application for Entry.
- § 272. Number of Acres to be Broken and Planted Annually. Time Extended in Case of Destruction by Grasshoppers or Drought.
- § 273. Proof of Cultivation, Final Certificate, and Patent.
- § 274. Right to be Forfeited on Failure to Comply with the Law.
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- § 276. Commissioner to Make Regulations. Fees of Registers and Receivers.
- § 277. False Oath Constitutes Perjury.
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- § 280. Lands Relinquished by Timber-culture Claimants Subject to Re-entry at Once.
- § 281. Contestants of Timber-culture Entries Allowed Thirty Days after Notice of Cancellation to Make Entry.

§ 252. *Timber on Mineral Lands may be Taken for Certain Purposes.*—All citizens of the United States and other persons *bona fide* residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; *provided*, that the foregoing provisions shall not extend to railroad corporations.

20 Stat. 88.

§ 253. *Duty of Register and Receiver to Report Unauthorized Taking.*—It shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized in the preceding section, within their respective land districts; and, if so, they shall immediately notify the commissioner of the general land office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

20 Stat. 88.

§ 254. *Penalty for Unauthorized Taking.*—Any person or persons who shall violate the provisions of the two next preceding sections, or any rules and regulations in pursuance thereof made by the secretary of the interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding \$500, and to which may be added imprisonment for any term not exceeding six months.

20 Stat. 89.

§ 255. *Timber and Stone Lands in California, Oregon, etc., to be Sold.*—Surveyed public lands of the United States within the states of California, Oregon, and Nevada, and in Washington territory, not included within military, Indian, or other reserva-

tions of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of \$2.50 per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands; *provided*, that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes; *and provided further*, that none of the rights conferred by the act approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

14 Stat. 251; 20 Id. 89; R. S. 2339, 2340, 2341.

§ 256. *Application for Purchase*.—Any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person

except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

20 Stat. 89.

§ 257. *Publication of Application.*—Upon the filing of said statement, as provided in the preceding section, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied, and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in section 2237 of the Revised Statutes, the applicant may be permitted to enter said tract, and, on the transmission to the general land office of the papers and testimony in the case, a patent shall issue thereon; *provided*, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the commissioner of the general land office.

17 Stat. 95; 20 Id. 89; R. S. 2238.

§ 258. *Cutting Timber Unlawfully.*—After the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said states and territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars; *provided*, that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

20 Stat. 90.

§ 259. *Certain Prosecutions, Relief from.*—Any person prosecuted in said states and territory for violating section 2461 R. S., who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of \$2.50 per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same; *provided*, that nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act; *and further provided*, that all moneys collected under this act shall be covered into the treasury of the United States. And section 4751 of the revised statutes is hereby repealed, so far as it relates to the states and territory herein named.

20 Stat. 90, 91.

§ 260. *Repeals.*—All acts and parts of acts inconsistent with the provisions of the five preceding sections are repealed.

20 Stat. 90, 91.

§ 260a. *Live-oak and Red-cedar Lands.*—The secretary of the navy is authorized, under the direction of the president, to

cause such vacant and unappropriated lands of the United States as produce the live-oak and red-cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of such timbers, as in his judgment may be necessary to furnish for the navy a sufficient supply of the same.

3 Stat. 347, 607; 4 Id. 242; R. S. 2458.

§ 261. *Selection of Live-oak and Red-cedar Tracts.*—The president is authorized to appoint surveyors of public lands, who shall perform the duties prescribed in the preceding section, and report to him the tracts by them selected, with the boundaries ascertained and accurately designated by actual survey or watercourses; and the tracts of land thus selected with the approbation of the president shall be reserved, unless otherwise directed by law, from any future sale of the public lands, and be appropriated to the sole purpose of supplying timber for the navy of the United States; but nothing in this section contained shall be construed to prejudice the prior rights of any person claiming lands, which may be reserved in the manner herein provided.

3 Stat. 347; R. S. 2459.

§ 262. *Protection of Live-oak and Red-cedar Timber.*—The president is authorized to employ so much of the land and naval forces of the United States as may be necessary effectually to prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to prevent the transportation or carrying away any such timber as may be already felled or cut down; and to take such other and further measures as may be deemed advisable for the preservation of the timber of the United States in Florida.

3 Stat. 651; R. S. 2460.

§ 263. *Cutting or Destruction of Live-oak or Red Cedar; Penalty.*—If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying, any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States; or if any person shall remove, or cause or procure to be re-

moved, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting, any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing, any live-oak or red-cedar trees, or other timber, from any other lands of the United States, acquired or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.

4 Stat. 472; R. S. 2461.

§ 264. *Vessels Employed in Carrying Away Live-oak and Red Cedar; Forfeiture of.*—If the master, owner, or consignee of any vessel shall knowingly take on board any timber cut on lands which have been reserved or purchased as in the preceding section prescribed, without proper authority, and for the use of the navy of the United States; or shall take on board any live-oak or red-cedar timber cut on any other lands of the United States, with intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the vessel on board of which the same shall be taken, transported, or seized, shall, with her tackle, apparel, and furniture, be wholly forfeited to the United States, and the captain or master of such vessel wherein the same was exported to any foreign country against the provisions of this section shall forfeit and pay to the United States a sum not exceeding \$1,000.

4 Stat. 472; R. S. 2462.

§ 265. *Clearance of Vessels Laden with Live-oak; Prosecution of Depredators.*—It shall be the duty of all collectors of the customs within the states of Alabama, Mississippi, Louisiana, and Florida, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, to ascertain satisfactorily that such timber was cut from private lands, or, if from public ones, by consent of the navy department. And it is also made the duty of all officers of the customs, and of the land officers

within those states, to cause prosecutions to be seasonably instituted against all persons known to be guilty of depredations on or injuries to the live-oak growing on the public lands.

4 Stat. 647; R. S. 2463.

§ 266. *Secretary of Navy to Ascertain What Reserved Lands not Required for Naval Purposes.*—The secretary of the navy is authorized to cause an examination to be made of the condition of all lands in the state of Florida which have been set apart or reserved for naval purposes, excepting the reservation upon which the navy-yard at Pensacola is located, and to ascertain whether or not such reserved lands are or will be of any value to the government of the United States for naval purposes.

20 Stat. 470, 471.

§ 267. *Lands not Required to be Certified to Secretary of Interior and thereafter to be Subject to Entry and Sale.*—All of said lands which, in the judgment of the secretary of the navy, are no longer required for naval purposes shall, as soon as practicable, be certified by him to the secretary of the interior, and be subject to entry and sale in the same manner and under the same conditions as other public lands of the United States; *provided*, that all persons who have, in good faith, made improvements on said reserved lands so certified on the third day of March, 1879, and who occupy the same, shall be entitled to purchase the part or parts so occupied and improved by them, not to exceed 160 acres to any one person, at \$1.25 per acre within such reasonable time as may be fixed by the secretary of the interior.

20 Stat. 471.

§ 268. *Cutting or Injuring Trees on Lands of United States Reserved or Purchased for Public Uses.*—If any person or persons shall knowingly and unlawfully cut, or shall knowingly aid, assist, or be employed in unlawfully cutting, or shall wantonly destroy or injure, or procure to be wantonly destroyed or injured, any timber tree or any shade or ornamental tree, or any other kind of tree, standing, growing, or being upon any lands of the United States, which, in pursuance of law, have been reserved, or which have been purchased by the United States for any public use, every such person or persons so offending, on conviction thereof before any circuit or district court of the United States, shall, for every such offense, pay a fine not exceeding \$500, or shall be imprisoned not exceeding twelve months; *provided*, that nothing in this section shall be

construed to apply to unsurveyed public lands and to public lands subject to pre-emption and homestead laws, nor to public lands subject to an act to promote the development of the mining resources of the United States, approved May 10, 1872.
18 Stat. 481, 482.

§ 269. *Authority to Condone Trespasses Committed Prior to March 1, 1879.*—When any lands of the United States, not mineral, shall have been entered and the government price paid therefor in full, no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said lands, and no civil suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any *bona fide* settler, or for or on account of any timber or material taken or used by any person without fault or knowledge of the trespass; or for or on account of any timber taken or used without fraud or collusion by any person who, in good faith, paid the officers or agents of the United States for the same, or for or on account of any alleged conspiracy in relation thereto; *provided*, that the provisions of this section shall apply only to trespasses and acts done or committed, and conspiracies entered into prior to March 1, 1879; *and provided further*, that defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment, and shall pay all costs accrued up to the time of such entry.

Act of June 15, 1880.

§ 270. *Timber-culture Entries—Patents to Issue for Land Cultivated in Timber at Expiration of Eight Years.*—The act entitled “An act to amend the act entitled ‘An act to encourage the growth of timber on western prairies,’” approved March 13, 1874, is amended to read as follows: That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, who shall plant, protect, and keep in a healthy, growing condition for eight years, 10 acres of timber, on any quarter-section of any of the public lands of the United States, or 5 acres on

any legal subdivision of 80 acres, or $2\frac{1}{2}$ acres on any legal subdivision of 40 acres or less, shall be entitled to a patent for the whole of said quarter-section, or of such legal subdivision of 80 or 40 acres, or fractional subdivision of less than 40 acres, as the case may be, at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in the next section; *provided*, that not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this law.

20 Stat. 113, 114, 115.

§ 271. *Oath on Application for Entry.*—The person applying for the benefits of this law shall, upon application to the register of the land district in which he or she is about to make such entry, make affidavit, before the register or the receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated; which affidavit shall be as follows, to wit: I, —, having filed my application number —, for an entry under the provisions of an act entitled “An act to amend an act entitled ‘An act to encourage the growth of timber on the western prairies,’” approved — 18—, do solemnly swear (or affirm) that I am the head of a family (or over twenty-one years of age), and a citizen of the United States (or have declared my intention to become such); that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber; that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whatsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of the law; and that I have not heretofore made an entry under the timber-culture laws.

20 Stat. 113, 114, 115.

§ 272. *Number of Acres to be Broken and Planted Annually.*—Upon filing said affidavit with the register and receiver, and on payment of ten dollars, if the tract applied for is more than eighty acres, and five dollars if it is eighty acres or less, he or she shall thereupon be permitted to enter the quantity of land specified; and the party making an entry of a quarter-section shall be required to break or plow five acres covered thereby

the first year, five acres the second year, and to cultivate to crop or otherwise the five acres broken or plowed the first year; the third year he or she shall cultivate to crop or otherwise the five acres broken the second year, and to plant in timber, seeds, or cuttings the five acres first broken or plowed, and to cultivate and put in crop or otherwise the remaining five acres, and the fourth year to plant in timber, seeds, or cuttings the remaining five acres. All entries of less quantity than one quarter-section shall be plowed, planted, cultivated, and planted to trees, tree-seeds, or cuttings, in the same manner and in the same proportion as hereinbefore provided for a quarter-section; *provided, however*, that in case such trees, seeds, or cuttings shall be destroyed by grasshoppers, or by extreme and unusual drought for any year or term of years, the time for planting such trees, seeds, or cuttings shall be extended one year for every such year that they are so destroyed; *provided further*, that the person making such entry shall, before he or she shall be entitled to such extension of time, file with the register and the receiver of the proper land office an affidavit, corroborated by two witnesses, setting forth the destruction of such trees, and that, in consequence of such destruction, he or she is compelled to ask an extension of time, in accordance with the provisions of this law.

20 Stat. 113, 114, 115.

§ 273. *Proof of Cultivation, Final Certificate, and Patent.*—No final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from the date of such entry; and if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he, or she, or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre, they shall receive a patent for such tract of land.

20 Stat. 113, 114, 115.

§ 274. *Right to be Forfeited on Failure to Comply with the Law.*—If at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to

comply with any of the requirements of this law, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this law; *provided*, that the party making claim to said land, either as a homestead settler, or under this law, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the commissioner of the general land office; and the rights of the parties shall be determined as in other contested cases.

20 Stat. 113, 114, 115.

§ 275. *Land not Liable for Prior Debts.*—No land acquired under the provisions of this law shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

20 Stat. 113, 114, 115.

§ 276. *Commissioner to Make Regulations.*—The commissioner of the general land office is required to prepare and issue such rules and regulations, consistent with this law, as shall be necessary and proper to carry its provisions into effect; and the registers and receivers of the several land offices shall each be entitled to receive two dollars at the time of entry, and the like sum when the claim is finally established and the final certificate issued.

20 Stat. 113, 114, 115.

§ 277. *False Oath Constitutes Perjury.*—The fifth section of the act entitled "An act in addition to an act to punish crimes against the United States, and for other purposes," approved March 3, 1857, shall extend to all oaths, affirmations, and affidavits required or authorized by this act.

11 Stat. 250; 20 Id. 113, 114, 115; R. S. 5392.

§ 278. *Entries under Former Laws, how Perfected.*—Parties who have already made entries under the acts approved March 3, 1873, and March 13, 1874, shall be permitted to complete the same upon full compliance with the provisions of this chapter; that is, they shall, at the time of making their final proof, have had under cultivation, as required by this chapter, an amount of timber sufficient to make the number of acres required by this chapter; and all laws and parts of laws in conflict with the provisions of this chapter are hereby repealed.

17 Stat. 605; 18 Id. 21; 20 Id. 113, 114, 115.

§ 279. *Publication of Notices of Contest.*—The notices of contest provided by law under the tree-culture laws shall be printed

in some newspaper printed in the county where the land in contest lies; and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land.

20 Stat. 91.

§ 280. *Lands Relinquished by Timber-culture Claimants Subject to Entry at Once.*—When any timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry, without further action on the part of the commissioner of the general land office.

Act of May 14, 1880.

§ 281. *Contestant of Timber-culture Entry Allowed Thirty Days after Notice of Cancellation to Make Entry.*—In all cases where any person has contested, paid the land office fees, and procured the cancellation of any timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands; and the register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.

Act of May 14, 1880.

CHAPTER XV.

TOWN SITES.

- § 282. First Method.
- § 283. Second Method.
- § 286. Portland, Oregon.
- § 287. Officer *de Facto*.
- § 288. Salt Lake City, Utah.
- § 288a. When Deed from Trustee Void.
- § 289. Meaning of the Word "Occupant."
- § 290. Municipal Pre-emption Act of May 23, 1844. Trustees of Towns.
- § 291. Parties in *Pari Delictu*.
- § 291a. Finality of Decisions.
- § 292. Mines within Town Sites.
- § 293. General Circular, October 1, 1880.
- § 297. Surveyed and Unsurveyed Lands.

§ 282. *First Method*.—There are two methods of acquiring title to town sites on public lands. By one method, under sections 2382, 2383, 2384, and 2385 of the revised statutes of the United States, the area of the city or town is limited to 640 acres. The founders are to lay it off in lots. A map is to be made, describing its exterior boundaries, according to the lines of the public surveys, where such lines are executed, giving the name of the city or town, exhibiting the streets, squares, blocks, lots, etc., the lots not to exceed 4,200 square feet, with a statement of the extent and general character of the improvements; the map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish the city or town. The map and statement must be filed with the recorder for the county in which the town is situated, and if it is in an organized land district, a verified copy must be filed with the register and receiver. Within a month after the filing in the recorder's office, a similar verified copy must be filed in the general land office, with the testimony of two witnesses that the city or town has been established in good faith. The lots may then be offered for sale at a minimum of ten dollars for each lot.

§ 283. *Second Method*.—Where it is preferred, as it usually is, the other method may be adopted. Sections 2387, 2388, and

2389, revised statutes, grant to the inhabitants of cities and towns on the public lands the privilege of entering the lands as town sites, at the minimum price of \$1.25 per acre, through the corporate authorities of such towns and cities, or the judges of the county courts, acting as trustees for the occupants thereof. The maximum quantity liable to entry varies with the number of inhabitants, as will be seen by reference to the statute.

Surveying a tract of public lands and dividing it into town lots, making a plat of it as a town, and building one house on one lot, is not sufficient to impress upon it the character of a town, so as to withdraw it from the operation of the pre-emption law.

Townesley v. Johnson, 1 Neb. 95.

§ 284. Lots not platted on a town-site map, nor fenced, can not be held by the corporation, if there is an adverse claim.

Robinson v. Mining Co., 5 Nev. 44.

The state of Nevada stands in the situation of an ordinary trustee as to all the public land granted to it by the United States, except the 90,000 acres granted for the purposes of an agricultural or mining college, as to which she has undertaken to bear the expenses of converting the trust lands into interest-bearing bonds, without calling on the trust fund for reimbursement.

Nevada v. Rhodes, 4 Nev. 312.

No title can be acquired under the town-site laws to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws.

R. S. 2392.

Land that is mineral is subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for town-site purposes.

Kemp v. Starr, 6 Copp's L. O., p. 3.

§ 285. Coal lands can not be included in a town-site entry.

1 Copp's L. O., p. 19; 4 Id., p. 46.

Salt land, more valuable for its salt than for agricultural purposes, may be treated as mineral land.

1 Copp's L. O., p. 19; 4 Id., p. 46.

There must be actual occupancy for the purposes of trade of the tracts filed upon under the town-site acts to exempt the land from the operation of the pre-emption laws.

1 Copp's L. O., p. 6; 4 Id., p. 132.

§ 286. *Portland, Oregon*.—A patent issued by the corporate

authorities of the city of Portland, in Oregon, in December, 1860, upon an entry made under the town-site act of May 23, 1844, passed no title to the land covered by the donation claim of a person whose right to a patent was perfected previous to such entry, and whose claim was surveyed previously to the act of July 17, 1854, by which the town-site act was for the first time extended (though with qualifications) to Oregon territory. The act of August 14, 1848, organizing the territory, did not extend over the country either the pre-emption act or the town-site act.

Stark v. Starra, 6 Wall. 402.

• § 287. *Officer de Facto*.—An incorporated town in Utah was situate on public lands which were duly entered at the proper land office by the mayor, to whom a patent was issued under the act of March 2, 1867 (14 Stat. 541). The legislature of the territory as authorized by that act enacted the requisite rules and regulations for the disposal of lots in the town, and provided that the party who was the original owner of possession or occupant, or was entitled to the possession or occupancy of a lot, should on certain conditions be entitled to a deed therefor from the mayor. A mode whereby contested claims could be determined was prescribed: A., before the lands were entered, was in the possession of a lot and mortgaged it to B., but thereafter remained in possession. In a foreclosure suit, brought in a proper court against A., wherein the process sued out was served by a marshal of the United States for that territory, a decree was rendered, whereunder he, still acting as the ministerial officer of the court, under the decisions of the local courts that he was entitled to do so, made sale of the lot to C. The sale was confirmed by the court, and C. conveyed the lot to D., a non-resident. A. and D. respectively claimed a deed from the mayor. Held, first, that A.'s interest in the lot, before the lands were entered, could be the subject of sale or mortgage; second, that although this court subsequently decided that the marshal could act only where the United States were concerned, his doings in the premises were those of an officer *de facto*; that by his service of process, the court acquired jurisdiction of the person of A.; that the sale under the decree extinguished A.'s right to the lot, and that D. was entitled to a deed therefor from the mayor.

Hussey v. Smith, 9 Otto, 20.

§ 288. *Salt Lake City, Utah*.—A., possessed of a lot in the

city of Salt Lake, Utah, died in 1857, leaving a widow and minor children. Under the act of March 2, 1867 (14 Stat. 541), the mayor, November 4, 1871, duly entered, at the proper land office, the land occupied as the site of the city, and received, June 1, 1872, a patent therefor "in trust for the several use and benefit of the occupants thereof according to their respective interests." The legislature of the territory prescribed, by a statute approved February 17, 1869, rules and regulations for the execution of such trusts, and provided that the several lots and parcels within the limits of the land so entered should be conveyed to the rightful owner of possession, occupant, or occupants, or to such person as might be entitled to the occupancy or possession. A. owned a certain lot. Shortly after A.'s death his widow relinquished possession of a part of the lot. She subsequently conveyed another portion thereof and removed with her children therefrom. Another portion was sold by the administrator of A. to pay taxes assessed and debts incurred by making improvements upon the property after the latter's death. The purchaser paid full value therefor, and has, since December 10, 1869, remained in the exclusive possession thereof. Held,

1. That A., at the time of his death, had, by reason of his possession of the lot, an inchoate right to the benefit of the act of congress, should the lands be entered under its provisions, and that his right to maintain the possession, as against the other inhabitants of the city, descended, under the laws of Utah, to his widow and children.

2. That the withdrawal of the widow and children from parts of the lot, and her voluntary surrender of all control over them, extinguished her right and their rights as to such parts.

3. That under the territorial statute an occupant of a lot could sell and convey his possessory right therein before the lands were so entered.

4. That the purchaser from the administrator is entitled to a conveyance from the mayor.

5. That the widow and children are entitled to a deed from the mayor, conveying to them according to their respective interests, that part of the lot whereof they were in possession at the time the lands were entered.

Stringfellow v. Cain, 9 Otto, 610.

§ 288a. *Deed from Trustee Void.*—A trustee of a town site upon public lands has no judicial power, and can not execute a deed of town lot to an applicant who has complied strictly with the law. The party must be either in possession of or entitled

to the possession of the premises. And a deed to an unclaimed lot in a town site is void, if the trustee has executed the same without advertising that it would be sold at public sale.

Edwards v. Tracy, 2 Mont. 48.

§ 289. *Meaning of the Word "Occupant."*—In the case of Hussey v. Smith, the supreme court of Utah held that an "occupant," within the meaning of the town-site law, is one who is a settler or resident of the town, and in the *bona fide* actual possession of the lot at the time the entry is made.

1 Utah, 129.

But in the case of Lechler v. Chapin, the court hold a different rule, to wit: that there is nothing in the act of congress which limits the proof on the part of claimants to their interest in the land, at the time of entry thereof in the land office. If the land at that time is vacant, it is subject to location and occupancy by any person at any time prior to the issuance of patent. The act of congress is the paramount law, which the legislature of a state can not change.

12 Nev. 65.

In the case of Clifford v. McClellan, 1 Col. 370, it was held that the legislature had power to fix a period within which the claim of every beneficiary should be asserted.

In the case of Georgetown v. Glaze, it was held that the corporation could maintain a bill to correct an abuse of the trust affecting the common interest of all the beneficiaries, but could not interfere between individual applicants. The act of the legislature of California in reference to town sites is constitutional.

Ricks v. Reed, 19 Cal. 551.

§ 290. *The Municipal Pre-emption Act of May 23, 1844*, confers a right upon the corporate authorities or county judges to purchase the land forming a town site at the minimum government price for the benefit of the inhabitants thereof, before the commencement of the public sale of the body of the land in which the town is included; and if such right be not exercised, such lands with the general mass are offered for sale to the public. The lands in controversy were not reserved from sale by the laws of the United States, nor by the president, and consequently were subject to location by the state of California under her laws, and the patent of the state property issued to the plaintiff.

Dall v. Meader, 16 Cal. 295.

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The act of the legislature of Michigan, approved February 9, 1853, in reference to the town site of Ontonagon is unconstitutional and void.

6 Mich. 193.

The act of congress approved May 23, 1844 (5 Stat. 657), contemplates only such towns, cities, and villages as are in possession of and exercising the power of a local or municipal government.

Clark, Trustee, etc., v. Fay, 20 Wis. 478.

A trustee under the legislative act of Nebraska in reference to town sites, in deciding who are entitled to lots under the trust created by the congressional law, acts in a judicial capacity according to the supreme court of that state.

Tierney et al. v. Cornell, 3 Neb. 267.

Any state law which undertakes to dispose of the trust otherwise than as is prescribed by the act of congress is inoperative and void.

Town Co. v. Maris, 11 Kan. 128.

Any contract made by one of the occupants of a town site with a third person that the probate judge shall not enter the land under the town-site law of congress is illegal and void.

12 Kan. 62.

§ 291. *Parties in Pari Delictu.*—Where both parties to a contract which is void as against public policy are equally at fault, the law will leave them where it finds them. If the contract be executory it will not enforce it, nor award damages for its breach. If already executed it will not restore the price paid nor the property delivered. So where a town company, the occupants, and all interested in the town site made a contract with a county to deed it certain lots on the town site, providing the county seat was located at the town, and afterwards the county seat was so located and the lots deeded: held, that neither the town company, the occupants, the parties interested in the town site, nor one claiming under them, could avoid the deed or recover the land.

Setter v. Alvy, 15 Kan. 157.

§ 291a. *Finality of Decisions.*—In the case of Leech v. Ranch, it was held that the state courts have nothing to do with the question as to whether a town-site entry was properly or improperly made, as to whether sufficient or legal proof was made to authorize such entry, nor as to whether there was any proof at all.

The decision of the officers of the land office (or of the department in case of appeal) in these matters is final and conclusive. The duplicate is evidence of the fact of entry in accordance with the act, and that fact can not be litigated in the state courts.

3 Minn. 448; *Village of Mankato v. Meagher*, 17 Id. 265.

In dedications to the public for public use it is not necessary that there exist at the time a grantee capable of taking thereunder.

Under a statutory dedication in any town or city, a legal right to the possession with an interest in the land for the purposes of the trust passes.

City of Winona v. Huff, 11 Minn. 221.

§ 292. *Mines within Town Sites*.—Lands embraced within a town site on the public domain may, when unoccupied, be located by individuals and sold by the government for mining purposes.

Steel v. St. Louis Co., 1 Supreme Court Reporter, 389.

§ 293. *General Circular, October 1, 1880*.—The eighth chapter of the revised statutes of the United States, comprising sections 2380 to 2394, and the act of congress of March 3, 1877, provide for the disposal of town sites on the public domain.

There are two methods by which title to such town property may be acquired, subject to the election of parties desiring to do so; one provided for in sections 2382, 2383, 2384, and 2385, and the other in sections 2387, 2388, and 2389, of the revised statutes of the United States. The first method limits the extent of the area of the city or town to 640 acres, to be laid off into lots, and which, after filing in the general land office the transcript, statement, and testimony required by section 2382, are to be offered at public sale to the highest bidder, at a minimum of ten dollars for each lot. Lots not thus disposed of are made thereafter liable to private entry at said minimum, or at such reasonable price as the secretary of the interior may order from time to time, as the municipal property may increase or decrease, after at least three months' notice.

A privilege, however, is granted to any *actual settler* upon any one lot, of pre-empting that, and any additional lot on which he may have "substantial improvements," at said minimum, at any time before the day fixed for the public sale.

There are, however, certain preliminary conditions to be complied with in order to the enjoyment of the privileges granted

in this section. Parties who have already founded, or may hereafter found, a city or town are required:

§ 294. 1. To file with the recorder of the county in which the town or city is situate a plat thereof, not exceeding 640 acres, describing its exterior boundaries according to the lines of the public surveys where such surveys have been executed.

2. Also, the plat or map of such city or town must exhibit the name of the city or town; the streets, squares, blocks, lots, and alleys; the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed 4,200 square feet, with a statement of the extent and general character of improvements.

3. Further, the said map and statement to be verified by oath by the party acting for and in the behalf of the founders of the city or town.

4. Within one month after filing the map or plat with the recorder of the county, a verified copy of said map and statement is to be sent to the general land office, accompanied by the testimony of two witnesses that such city or town has been established in good faith.

5. Where the city or town is within the limits of an organized land district, a similar copy of the map and statement must be filed with the register and receiver.

Section 2383 provides for cities or towns founded on *unsurveyed* land, and directs that it may be lawful to adjust the exterior limits of the premises with the lines of the public surveys, where it can be done without impairing the rights of others. It also provides for the issue of patents for lots disposed of under these provisions, as in ordinary cases.

Section 2384 authorizes the secretary of the interior, in case the parties interested shall fail or refuse, within twelve months of the founding of a city or town on the public domain, to file in the general land office a copy of the map, with the statement and testimony called for by section 2382, to cause a survey and plat to be made of the said city or town, and thereafter the lots to be sold, as provided, at an increase of fifty per cent. on the minimum price of ten dollars per lot.

§ 295. Sections 2387, 2388, and 2389 grant to the inhabitants of cities and towns on the public lands the privilege of entering the lands occupied as town sites at the minimum price of \$1.25 per acre, through the corporate authorities of such towns and cities, or the judges of the county courts, acting as trustees for the occupants thereof.

. This privilege is granted where such mode of obtaining title to town property is preferred to that provided in sections 2382, 2383, 2384, and 2385, which are not repealed by the former sections.

The inhabitants of these towns or cities are limited, however to one or other of the modes provided in these statutes, and can not commence proceedings under both systems.

The provisions of sections 2382, 2383, 2384, and 2385 were originally embodied in the acts of congress of July 1, 1864, and March 3, 1865; those of sections 2387, 2388, and 2389, in the act of March 2, 1867. Section 2394 is a re-enactment of the act of June 8, 1868. It has reference to cases where the inhabitants of cities or towns proceeded to act under the provisions of the acts of July 1, 1864, and March 3, 1865, prior to June 22, 1874, the date of the revised statutes, and in which they have partly proved up and paid for the lots claimed by them according to said acts. It provides for extending the privilege of sections 2387, 2388, and 2389, if the town authorities in any such case should elect to proceed under them, to such of the inhabitants as may not have paid for their lots, without interfering with the issuing of patents to those who had made or might make entries or elect to proceed under the acts of July 1, 1864, and March 3, 1865, or sections 2382, 2383, 2384, and 2385 of the revised statutes. Accordingly, should any case be presented where proceedings had been commenced, as aforesaid, by the inhabitants of any town or city before the date indicated, and a part of them, not having entered and paid for their lots, desire to take advantage of the other system referred to, they would be entitled, under section 2394, on application to the register and receiver of the proper district office, through the town authorities, pursuant to the provisions of sections 2387, 2388, and 2389, to enter or file upon such portion of the town site as has not already been entered and paid for, and is not in possession of parties electing to complete their titles under the original proceedings; after which, that part of the town site so entered or filed upon will be disposed of under the last-mentioned sections, and the remaining portion, if any, under sections 2382, 2383, 2384, and 2385.

Section 2394 has no reference to any case in which proceedings for acquiring title to the town site were commenced subsequently to June 22, 1874, the inhabitants in all such cases being restricted to the method of acquiring title according to which they may have commenced to act.

§ 296. Section 2394 further provides that, in addition to the minimum price of the lands included in any town site entered under its provisions and those of sections 2387, 2388, and 2389, there shall be paid by the parties availing themselves thereof all costs of surveying and platting any such town site, and expenses incident thereto, incurred by the United States, before any patent therefor shall issue. Hence, when it is desired to enter a town site found upon the *unsurveyed* public lands, a written application should be presented to the surveyor general of the proper district for a survey of the same under section 2401 of the revised statutes, and the amount estimated by him as sufficient to cover the said cost and expenses deposited with any assistant United States treasurer or designated depository in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for the survey of the public lands," the depositor taking a duplicate certificate of deposit, one to be filed with the surveyor general to be sent to the general land office, and the other retained by the depositor. On receiving such certificate, showing that the requisite sum has been deposited in a proper manner to pay for the work, the surveyor general will transmit to the register and receiver of the district land office his certificate of such payment having been made, and will contract with a competent United States deputy surveyor, and have the survey made and returned in the same manner as other public surveys, after which the lands embraced within the site may be entered, or filed upon, as in the case of town sites upon surveyed lands.

§ 297. *Surveyed and Unsurveyed Lands.*—When town sites are located upon land already surveyed, the entry must be made in conformity to the legal subdivisions of the public lands, and here no costs in regard to past surveys will be exacted. When sites are upon *unsurveyed* land, it will be necessary, after the extension thereto of the public survey, to close those lines upon the exterior limits of the town site.

Section 2389, it will be observed, stipulates that there shall be conceded, where the number of inhabitants is one hundred and less than two hundred, not exceeding 320 acres; where the population is more than two hundred and less than one thousand, not exceeding 640 acres; and where the inhabitants number one thousand and over, not exceeding 1,280 acres; and for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of 320 acres.

All military and other reservations of the United States, pri-

vate grants, and valid mining claims are excluded from the operation of these townships. In patents issued thereunder it is expressly declared as follows, viz.: "No title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or any valid mining claim or possession held under existing laws of congress."

R. S. 2392.

In any territory in which a land office may not have been established, the declaratory statements provided for in the foregoing statutes may be filed with the surveyor general of the proper district.

In the act of congress of March 3, 1877, section 1 restricts the amount of land that can be reserved from pre-emption and homestead entry, by reason of the existence or incorporation of a town upon the public domain, to 2,560 acres, unless the excess shall "be actually settled upon, inhabited, improved, and used for business and municipal purposes."

Section 2 confirms pre-emption and homestead entries already made within the corporate limits of a town, the entries being regular in all respects; *provided*, it shall be satisfactorily shown that the lands so entered are "not settled upon or used for any municipal purpose, nor devoted to any public use of such town."

Section 3 provides that, when it shall appear that the corporate limits of a town embrace lands in excess of the maximum quantity allowed, the proper authorities may select those portions that are actually occupied, used, and improved for municipal purposes, which lands shall be reserved from pre-emption and homestead entry, and the residue will be restored, or become subject to such settlement and entry. This selection must be made within sixty days from notice, and in default thereof a hearing will be ordered and testimony taken as to the condition of the land, and such portion set apart as shall appear to be within the meaning of the act.

The fourth section, with the proviso to the second section, provides for additional entries by towns, where entries have already been made, in cases in which an increase in the number of inhabitants would entitle them to an entry of a larger area under section 2389 of the revised statutes of the United States, such entries, however, to be within the maximum amount of 2,560 acres.

CHAPTER XVI.

TOWN SITES AND COUNTY SEATS.

- § 298. Town Sites to be Reserved.
- § 299. Reservations to be Surveyed into Lots.
- § 300. Town or City Sites on Public Lands.
- § 301. When Towns Established upon Unsurveyed Lands, Extension Limits, how Adjusted.
- § 302. When Transcript Maps of Town are not Filed in Twelve Months, Proceedings by Secretary of Interior.
- § 303. Where Size of Lots or Town Plat Varies from General Rule.
- § 304. Title to Lots Subject to Mineral Rights.
- § 305. Entry of Town Authorities in Trust for Occupants.
- § 306. Entry under Preceding Section, when to be Made.
- § 307. Entry in Proportion to Number of Inhabitants.
- § 308. Authorities of Salt Lake City, Rights of, as to Entry.
- § 309. Additional Entry Allowed where Town has Entered Less than Maximum.
- § 310. Not More than 2,560 Acres to be Reserved for Town Site.
- § 311. Certain Entries within Town Sites Confirmed.
- § 312. Where Town Site Exceeds Maximum, Authorities to Select Lands to be Retained, or Commissioner may Take Testimony and Restrict Limits. Copies of Acts Incorporating Towns, how Furnished.
- § 313. Certain Acts of Trustees to be Void.
- § 314. Pre-emptions by Counties for Seats of Justice.
- § 315. No Title Acquired to Gold Mines, etc., or to Mining Claim, etc.
- § 316. Military or Other Reservations, etc.
- § 317. Inhabitants of Towns on Public Lands, Right of, to Enter.

§ 298. *Town Sites to be Reserved.*—The president is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

12 Stat. 754; 19 Id. 392; R. S. 2380.

§ 299. *Reservations to be Surveyed into Lots.*—When, in the opinion of the president, the public interests require it, it shall be the duty of the secretary of the interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to

be held subject to sale at private entry, according to such regulations as the secretary of the interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof; and all such sales shall be conducted by the register and receiver of the land office in the district in which the reservations may be situated, in accordance with the instructions of the commissioner of the general land office.

12 Stat. 754; R. S. 2381.

§ 300. *Town or City Sites on Public Lands.*—In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding 640 acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed 4,200 square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the general land office a verified transcript of such map and statement, accompanied by the testimony of two witnesses, that such city or town has been established in good faith, and when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the general land office, it may be lawful for the president to cause the lots embraced within the limits of such city or town, to be offered at public sale to the highest bidder, subject to a minimum of \$10 for each lot; and such lots as may not be disposed of at public sale, shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter, as the secretary of the interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as

a pre-emption, at such minimum, at any time before the day fixed for the public sale.

13 Stat. 343; R. S. 2382.

§ 301. *When Towns Established upon Unsurveyed Lands, Extension Limits, how Adjusted.*—When such cities or towns are established upon unsurveyed lands, it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases.

13 Stat. 344; R. S. 2383.

§ 302. *When Transcript Maps of Town are not Filed in Twelve Months, Proceedings by Secretary of the Interior.*—If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the general land office a transcript map, with the statement and testimony called for by the provisions of section 2382 R. S., it may be lawful for the secretary of the interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

13 Stat. 344; R. S. 2384.

§ 303. *Where Size of Lots or Town Plat Varies from General Rule.*—In the case of any city or town, in which the lots may be variant as to size from the limitation fixed in section 2382 R. S., and in which the lots and buildings, as municipal improvements, cover an area greater than 640 acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town, which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the secretary of the interior may by rule establish.

13 Stat. 530; R. S. 2385.

§ 304. *Title to Lots Subject to Mineral Rights.*—Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize

any color of title in possessors for mining purposes as against the United States.

13 Stat. 530; R. S. 2386.

§ 305. *Entry of Town Authorities in Trust for Occupants.*—Whenever any portion of the public lands has been or may be settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated.

14 Stat. 541; 18 Id. 254; R. S. 2387.

§ 306. *Entry under Preceding Section, when to be Made.*—The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any territory in which a land office may not have been established, such declaratory statements may be filed with the surveyor general of the surveying district in which the lands are situated, who shall transmit the same to the general land office.

14 Stat. 541; 18 Id. 254; R. S. 2388.

§ 307. *Entry in Proportion to Number of Inhabitants.*—If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred and less than two hundred, shall embrace not exceeding 320 acres; and in cases where the inhabitants of such town are more than two hundred and less than one thousand, shall embrace not exceeding 640 acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding 1,280 acres; but for each additional one

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thousand inhabitants, not exceeding five thousand in all, a further grant of 320 acres shall be allowed.

14 Stat. 541; 18 Id. 254; 19 Id. 392; R. S. 2389.

§ 308. *Authorities of Salt Lake City, Rights of, as to Entry.*—The words “not exceeding five thousand in all,” in the preceding section, shall not apply to Salt Lake City, in the territory of Utah; but such section shall be so construed in its application to that city that lands may be entered for the full number of inhabitants contained therein, not exceeding fifteen thousand; and as that city covers school-section number 36, in township number 1 north, of range number 1 west, the same may be embraced in such entry, and indemnity shall be given therefor when a grant is made by congress of sections 16 and 36, in the territory of Utah, for school purposes.

16 Stat. 183; 18 Id. 254; R. S. 2390.

§ 309. *Additional Entry Allowed where Town has Entered Less than Maximum.*—It shall be lawful for any town which has made, or may hereafter make, entry of less than the maximum quantity of land named in section 2389 R. S., to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes, as when added to the entry or entries theretofore made will not exceed 2,560 acres; *provided*, that such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population, as prescribed in said section.

19 Stat. 392, 393.

§ 310. *Not More than 2,560 Acres to be Reserved for Town Site.*—The existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2,560 acres of land, or the maximum area which may be entered as a town site under existing laws, unless the entire tract claimed or incorporated as such town site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes.

19 Stat. 392.

§ 311. *Certain Entries within Town Sites Confirmed.*—Where entries have been heretofore allowed upon lands afterwards ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown, to the satis-

faction of the commissioner of the general land office, to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent; *provided*, that this confirmation shall not operate to restrict the entry of any town site to a smaller area than the maximum quantity of land which, by reason of present population, it may be entitled to enter under section 2389 R. S.

19 Stat. 392.

§ 312. *Where Town Site Exceeds Maximum, Authorities to Select Lands to be Retained, or Commissioner may Take Testimony and Restrict Limits.*—Whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section 310 of this book, the commissioner of the general land office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from pre-emption and homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead and pre-emption laws. Upon default of said town authorities to make such selection within sixty days after notification by the commissioner, he may direct testimony respecting the actual location and extent of said improvements, to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section 310 of this book, and declare the remaining lands open to settlement and entry under the homestead and pre-emption laws; and it shall be the duty of the secretary of each of the territories of the United States to furnish the surveyor general of the territory, for the use of the United States, a copy, duly certified, of every act of the legislature of the territory incorporating any city or town, the same to be forwarded by such secretary to the surveyor general within one month from date of its approval.

19 Stat. 392.

§ 313. *Certain Acts of Trustees to be Void.*—Any act of the trustees not made in conformity to the regulations alluded to in section 2387 R. S. shall be void.

14 Stat. 541; 18 Id. 254; R. S., 2391.

§ 314. *Pre-emptions by Counties for Seats of Justice.*—There

shall be granted to the several counties or parishes of each state and territory, where there are public lands, at the minimum price for which public lands of the United States are sold, the right of pre-emption to one quarter-section of land, in each of the counties or parishes, in trust for such counties or parishes, respectively, for the establishment of seats of justice therein; but the proceeds of the sale of each of such quarter-sections shall be appropriated for the purpose of erecting public buildings in the county or parish for which it is located, after deducting therefrom the amount originally paid for the same. And the seat of justice for such counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located.

4 Stat. 50; R. S. 2286.

§ 315. *No Title Acquired to Gold Mines, etc., or to Mining Claim, etc.*—No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws.

14 Stat. 541; 15 Id. 67; 18 Id. 254; R. S. 2392.

§ 316. *Military or Other Reservations, etc.*—The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the crown of Spain, or otherwise.

14 Stat. 541; 19 Id. 264; R. S. 2393.

§ 317. *Inhabitants of Towns on Public Lands, Right of, to Enter.*—The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections 2387, 2388, and 2389; and, in addition to the minimum price of the lands embracing any town site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect to proceed under other laws relative to town sites in this chapter set forth.

15 Stat. 67; 18 Id. 254; R. S. 2394.

CHAPTER XVII.

BOUNTY LAND WARRANTS AND SCRIP.

- § 318. What Persons are Entitled.
- § 319. The Secretary of Interior must Locate.
- § 320. When Land Warrants are Real Estate.
- § 321. Porterfield Scrip.
- § 322. Valentine Scrip.
- § 323. Sioux Scrip.
- § 324. Agricultural College Scrip.
- § 325. Indian Lands.
- § 327. Assignments.
- § 328. Warrants, how Located.
- § 329. As to Locations.
- § 330. Miscellaneous Provisions.
- § 331. Supreme Court Scrip.
- § 332. Provisions for the Benefit of Soldiers and Sailors of the Late War.
- § 334. Provisions for the Benefit of Indians.

§ 318. *Who are Entitled.*—The war with Mexico was proclaimed on the thirteenth of May, 1846, and on the eleventh of February, 1847, an act was passed giving bounties for military service.

It ordered that non-commissioned officers, musicians, and privates who served in the war with Mexico, in the volunteer army of the United States for twelve months, or who should be discharged for wounds or sickness prior to that time, or in case of his death while in the service, then his heirs, should receive a certificate or warrant from the war department for the quantity of 160 acres of land, the same to be entered at any district land office on lands open to private entry, the certificate to be returned to the general land office, and patent to issue therefor.

There was in this act a provision for acceptance by applicant of a treasury scrip for \$100 at six per cent. interest in lieu of 160 acres of land.

Those who served less than twelve months on like terms as to death or discharge from wounds were to receive each a warrant for 40 acres of land or scrip for \$25 if preferred.

The privileges of bounty lands were extended by the act of September 28, 1850, granting an 80-acre warrant, and relating to services in all the Indian wars since 1790, the war of 1812,

and to the commissioned officers in the war with Mexico; by act March 22, 1852, making land warrants assignable, and extending the provisions of the act of September 28, 1850, and by the act of March 3, 1855.

The last act made 120-acre, 100-acre, 60-acre, and 10-acre warrants, and extended the bounty land privilege so as to make the entire classes receiving the same, some thirty-two in number, in the army, navy, and elsewhere. It was a comprehensive act, embracing almost all the wars the United States had participated in. It granted to all officers and soldiers who had served in any war in which our country had been engaged from the revolution to the third of March, 1855, 160 acres each, or so much, with what had been previously allowed, as would make up that quantity. It extended the concession to a service of only fourteen days, or an engagement in a single battle, and in case of death, to the widow and minor children.

§ 319. *The Secretary must Locate.*—And it is made the duty of the commissioner of the general land office, under the direction of the secretary of the interior, to cause to be located free of expense any warrant which the holder may transmit to the general land office for that purpose, in such state or land district as the holder or warrantee may designate, and upon good farming-land, so far as the same can be ascertained from the maps, plats, and field-notes of the surveyor, or from any other information in the possession of the local office, and upon the location being made, the secretary shall cause a patent to be transmitted to such warrantee or holder.

R. S. 2437.

§ 320. *Land Warrants for Bounty Lands are Real Estate;* and where parties first entitled have died, they must, in general, issue to their heirs or devisees, and not to the administrator with the will annexed.

2 Opinions of Attorney General, p. 506; but see § 328.

In a certain case where there was a will and administrator, and there were no conflicting interests, and where the issuing of the warrant to the heirs would embarrass the administrator, the warrant was issued to the administrator in trust for the purposes mentioned in the will.

2 Opinions of Attorney General, p. 506.

Only one warrant can issue to the same party for the same claim; but warrants and patents for bounty lands should issue to the applicant really entitled to them, notwithstanding war-

rants and patents may have erroneously issued to others through imposition or fraud.

2 Opinions of Attorney General, p. 501.

Minor children born after the date of the act of September 28, 1850, are included within the provisions of the act.

9 Opinions of Attorney General, p. 427.

§ 321. *Porterfield Scrip*.—Porterfield scrip can be located on unoffered surveyed lands, and appropriation *de facto* with valuable improvements does not prevent the location of this scrip. Lands within the limits of an incorporated town may sometimes be located with it.

Valentine scrip is locatable only on unoccupied and unappropriated lands; Porterfield, on lands not *legally* appropriated.

City of Seattle v. Bywater, Copp's L. L., p. 1014.

Even a reservation made *after* the location of Porterfield scrip is invalid, and the locator is entitled to the land.

Copp's L. L., p. 1016.

§ 322. *Valentine Scrip*.—This scrip can be located on either surveyed or unsurveyed lands, but it can not be located on an unconfirmed private land claim prior to a decree confirming or rejecting the same.

See the Chicago cases, Copp's L. L., pp. 1022-1031.

· § 323. *Sioux Scrip*.—The instructions of February 22, 1864 (2 Lester, 369), prescribe that within three months after the filing of the plat of survey the scrip locator on unsurveyed lands shall repair to the district land office, file his scrip with his affidavit, designating specifically in compact legal subdivisions the tracts embracing his improvements, and should state in his affidavit the character and extent of his improvements and file testimony of competent witnesses corroborative of his statement.

The circular also instructs district officers that no mineral or reserved lands can be taken by this scrip, nor can it be located upon the even-numbered double-minimum reserved sections. In the claims of the Illinois Central R. R. Co. and others (Copp's L. L., 1882, p. 311), the department held, "that although these pieces of scrip [Sioux half-breed scrip] were filed for location on unsurveyed lands, and were each accompanied by an affidavit of one Reynolds, who sets forth his personal acquaintance with the land, and that there are no improvements thereon, save those by or for the scrip locator, or his attorney, there is no evidence that any improvements have

been made by or for those persons. And as these locations are all in conflict with claims under the pre-emption and homestead laws, this is a fatal defect, and for that reason, if for no other, they are invalid and void."

§ 324. *Agricultural College Scrip*.—This scrip may be used:

1. In the location of land at private entry, but when so used it is only applicable to lands not mineral which may be subject to private entry at \$1.25 per acre, and is restricted to a technical quarter-section; that is, land embraced by the quarter-section lines indicated on the official plats of survey; or it may be located on *part* of a quarter-section, where such part is taken in full for a quarter; but it can not be applied to different subdivisions to make an area equivalent to a quarter-section.

The manner of proceeding to acquire title with this class of paper is the same as in cash and warrant cases, the fees to be paid being the same as on warrants. The location of the scrip at private entry is restricted to three sections in each township of land, and 1,000,000 acres in any one state.

2. In payment of pre-emption claims in the same manner, and under the same rules and regulations as govern the application to pre-emption to military land warrants; this too without regard to the limitation as to the quantity located in a township or in a state.

3. In payment for homesteads commuted under section 2301 of the revised statutes of the United States.

§ 325. *Indian Lands*.—Reservations for Indians are both made and set aside by executive order. In the early days of the republic it was held that the Indians had no title to any of the lands which they occupy, and consequently could transfer no right to the soil.

Johnson v. McIntock, 8 Wheat. 543.

In this case Chief Justice Marshall held that the right to make grants was vested originally in the crown; that by the treaty of 1783 it was surrendered by Great Britain to the United States; and that consequently the United States has a right to extinguish the Indian title of occupancy, either by purchase or conquest. Commissioner Williamson, on the eighth of March, 1881, held that the Cherokee reservation, in the state of Kansas, was still intact; but recommended compensation to the Indians, and a recognition and confirmation of the rights of actual settlers.

Copp's L. L., p. 1322.

The act of May 11, 1872, relative to these lands, requires set-

tlement, but not necessarily residence, as a condition of sale. The term "settlement" does not necessarily imply residence in person; it does imply cultivation, with intention of making it a home.

Copp's L. L., p. 1330.

Osage trust lands in Kansas are not of the class included in the term "public lands," nor are the rules that govern them the same in all respects as the pre-emption laws. But to secure title to these lands, a full compliance with the pre-emption laws as regards settlement, residence, and cultivation and improvement will be insisted on, except in cases otherwise provided for in the act of August 11, 1876.

Copp's L. L., p. 1345.

§ 326. The supreme court of California, in the case of *Parker et al. v. Duff et al.*, 47 Cal. 554, holds that the officers of the land department can not issue scrip for land selected under the treaty with the Chippewa Indians, dated September 30, 1854, outside the ceded territory; that such scrip and a patent issued thereon is without authority of law, and if they show for what they were issued, they are void on their face. On examination of the above-mentioned case it will be observed that the court was, on its own theory of the case, dealing with property belonging to the United States, and interpreting a treaty made by the United States; that it set aside an official act of the president of the United States; and that the United States was not a party to any of the proceedings before the court.

§ 327. *Assignments*.—1. No assignment of a warrant executed prior to the date of the issue thereof can be recognized by this office.

R. S. 2436.

2. The assignment is required to be indorsed, as far as practicable, upon the warrant transferred. Should it be found necessary, in any case, to write the entire assignment on a separate paper, which can only occur when prior assignments have filled entirely the blank space on the warrant, it must be so attached as to show unmistakably that the warrant assigned was in the hands of the party making the transfer. In such cases the signature of the assignor must be affixed in the presence of the officer before whom it is acknowledged, who must certify that, at the date of the assignment, the warrant was presented by and in possession of the assignor.

3. The same requirement must be observed in the preparation

and acknowledgment of powers of attorney to sell or locate bounty land warrants.

4. Blank assignments are void, and will not be recognized by this office. The name of an assignee should be written in the assignment before the warrant is sent to the local or general land office.

5. Each assignment must be attested by two subscribing witnesses; the mark of a witness will not be respected.

6. Parties in interest, as assignees, are not recognized as legal attesting witnesses to an assignment; neither can an officer take an acknowledgment of an assignment to himself.

7. The execution of assignments is required to be acknowledged by the assignor, in the presence of a register or receiver of a land office, a judge or clerk of record—when authorized to take acknowledgments—a notary public, justice of the peace, a commissioner of deeds, resident in the state from which he derives his appointment, or a commissioner of a circuit court of the United States, who shall certify to the fact of the acknowledgment, and to the identity of the assignor; and the official seal of said court, notary public, or commissioner shall be affixed to the certificate. When the acknowledgment is taken before a justice of the peace or other officer, without an official seal (except a register or receiver of a land office), it must be accompanied by an additional certificate, under seal of the proper authority, establishing the official character of the person before whom the acknowledgment was made, and the genuineness of his signature. *Powers of attorney* must be acknowledged in like manner.

8. Assignments executed by unmarried females must be accompanied by evidence that they have attained the age of twenty-one years; and when married women assign, their husbands must unite with them in making the transfer.

9. Assignments executed by a commissioner, or other designated person, alleged to be acting under a decree of court, must be accompanied by a duly certified copy of such decree, in which all the proceedings had in the case should be recited, and from which it must appear that due notice of the pending suit had been given, by publication or otherwise, to all the parties interested.

10. Where two assignments exist, executed by the same party, but made in favor of different individuals, the person first named as assignee must execute a transfer in favor of the

second grantee, whether the assignment to him had been completed or not.

11. When the name of a person has been inadvertently inserted in an assignment of a warrant, and erased therefrom, there should be filed an affidavit, duly authenticated, from such person, stating that his name had been erroneously written in said transfer, and erased with his knowledge and consent, and that he claims no right or interest in the warrant; when such person can not be found, the title of the party whose name has been written over the erasure will not be respected by this office until the validity thereof has been satisfactorily affirmed by a court of competent jurisdiction. When the name of a *bona fide* assignee has been erased from a transfer, an assignment from said assignee to the present holder of the warrant will be required to perfect the chain of title to the warrant.

12. When the assignment of a warrant is executed in a foreign country, and the acknowledgment thereof taken by an officer authorized by the laws thereof to perform such duties, the attestation of the American consul in such country should be obtained as to the official character and genuineness of the signature of the person before whom the acknowledgment of the assignment was made; or if the official character, etc., of such foreign magistrate is attested by a consular agent of such foreign government residing in this country, his official character must be certified by the diplomatic representative of such government of the United States. When such assignments are executed in a foreign language, duly authenticated translations thereof must be furnished. Secretaries of legation and consular officers of the United States are authorized to take acknowledgments, but they must certify the same under their official seals.

13. When the persons named as warrantees are described in the warrant as being minors, their assignment thereof must be accompanied by satisfactory evidence that they had attained their majority at the date of the transfer.

14. When an assignment has been executed and witnessed, but not acknowledged, it may be proved in open court, but a certified transcript of the proceedings in the case must be attached to the warrant; when, however, such assignment has not been properly attested, it must be made anew.

15. When an assignment is made by an Indian residing among the whites, the prescribed form will be adopted, with this single addition, that the officer taking the acknowledgment

shall certify that the Indian is capable of contracting, also the amount paid to him for the warrant, and that he saw the same paid to the Indian.

16. Where it is made by an Indian holding tribal relations, his identity and ability to contract must be certified by the superintendent of Indian affairs, or Indian agent, either of his own knowledge, or on the testimony of the chiefs, certifying to the amount paid for said warrant, that the same was paid in his presence, and that the transaction was fair and regular. In either case, if the amount paid is not a fair consideration the assignment will be disregarded.

17. Where a warrant for the services of an Indian is issued, or descends to minors who no longer retain their tribal relations, it must be located or sold by a guardian duly appointed and authorized by the proper court for that purpose. Where the minor or minors retain their tribal relations, the agent or superintendent must certify that they are entitled to the warrant under the laws, usages, and customs of the tribe; and, when sold or located, that it was done by the guardian or such proper representatives as, according to said laws, usages, and customs, was fully authorized. In all cases where the signature of the superintendent or Indian agent is herein required, the genuineness of the signature of that officer must be attested by the commissioner of Indian affairs.

§ 328. *Land Warrants as Real Estate.*—18. Prior to June 3, 1858, military land warrants were regarded as real estate; consequently a transfer of such warrant before that date by an administrator, must be accompanied by evidence that the same was made in pursuance of an order of court for the sale of the real estate of the decedent. But by the act of June 3, 1858, which was re-enacted by section 2444 of the revised statutes, bounty land warrants were declared to be personal chattels, and as such to be assignable by the warrantees, by their widows in certain cases, by their heirs or devisees, or by the legal representatives of the deceased claimant, "for the use of the heirs or legatees only." It follows that the right to assign inures to the assignees of the vendors named above, and to their heirs, devisees, or legal representatives; but these latter are not required to assign "for the use of the heirs only."

19. Where a warrant has been issued in the name of a deceased soldier, who had applied therefor before his death, the title thereto is declared, by the said section 2444, revised stat-

utes, to vest in the widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant.

20. If the claimant died and left a widow, who also was deceased before the issue of the warrant, then the title thereto vests in the heirs or legatees of the warrantee.

21. To make a warrant issued in the name of a deceased person available, it should be accompanied by a certificate, under seal, from the proper court having probate jurisdiction, showing the fact of the death of the warrantee at a specified date, and stating whether he left a widow, giving her name if there was one. If there was no widow, the said certificate should state whether the warrantee died testate or intestate, and give the names of all his heirs at law, specifying such as are adults and such as are minors.

22. If it shall appear from such certificate that the warrantee died before the issue of the warrant and left a widow, the assignment of such widow, her heirs or legal representatives, will be regarded as a sufficient conveyance of the title to the warrant.

23. If the warrantee died after the issue of the warrant, or if he died before such issue and left no widow, the title vests in his heirs at law or legatees.

24. If he died intestate, his heirs, shown to be such by the required certificate of court, may assign the warrant, the adults for themselves, and the minors by their guardians, who shall file with the warrant a certified copy of their letters of guardianship, or a certificate from the clerk of the proper court, stating that such letters had been issued, and that they were in force at the date of the assignment. Or the administrator of the estate of the deceased warrantee, who died intestate, may assign the warrant "for the use of the heirs only," upon filing therewith a certified transcript of the letters of administration, or a certificate from the clerk of the proper court that the said letters had been issued, and that they were in force at the date of the assignment.

25. If the warrantee died testate, a certified transcript of the will must accompany the warrant. If the will specifically disposes of the warrant, the devisee or devisees may assign, if adults, in the usual form; if minors, by their guardians as aforesaid. If the will does not specifically dispose of the warrant, the executor of the estate of the warrantee may assign "for the use of the heirs or legatees only;" but in that case a certified transcript of the letters testamentary, or a certificate from the proper authority that such letters had been granted,

and were in force at the date of the assignment, must accompany the transfer.

26. An assignment executed by an administrator *de bonis non* with the will annexed of the estate of the deceased warrantee, must be accompanied by evidence of his authority to act, as required in the case of an administrator of the estate of a warrantee who had died intestate.

§ 329. *As to Locations.*—27. Military bounty land warrants may be located upon any vacant public lands of the United States that are subject to sale at private entry, and they may be used in payment of pre-emption claims, or in commutation of homestead entries, even when the same embrace unoffered lands.

28. A warrant issued to several parties, or assigned to three or more persons, can not be located if assigned by one of the owners to another, or to other persons, so as to invest any one of the parties with a greater interest than any other. In other words, each owner of a warrant, at the time of its location, must have an equal share or interest therein.

29. A warrant may be located either at a district land office, or through the agency of this office.

R. S. 2437.

If located at a district office, it must be accompanied by a tender of the fees to which the register and receiver are entitled, and by a written application to locate, containing a description of the tracts desired, signed by the locator, or his attorney in fact. If by the latter, his authority to act must be evidenced by a power of attorney, which must be prepared in accordance with form No. 14, and indorsed, if practicable, upon the warrant.

See Rule No. 2.

30. If the location is made through this office, the warrant must be sent to the commissioner, with a request that the same be located in a specified land district, and accompanied by a receipt from the register and receiver for the fees to which they may be severally entitled under section 2238, revised statutes.

31. Each warrant is required to be distinctly and separately located upon a compact body of land; and if the area of the tract claimed should exceed the number of acres called for in the warrant, the locator must pay for the excess in cash; but if it should fall short, he must take the tract in full satisfaction for his warrant. A person can not enter a body of land with a

number of warrants without specifying the particular tract or tracts to which each shall be applied; and for each warrant there must be a distinct location, certificate, and patent.

32. Where the desired tract is subject to entry at a greater minimum than \$1.25 per acre, the locator, in addition to the surrendered warrant, must pay in cash the difference between the value of such warrant at \$1.25 per acre and that of the said land; or present a warrant of such denomination as will, at its legal value of \$1.25 per acre, cover the rated price of the tract, and pay the excess in value of the land, if any, in cash. For example: A tract of 40 acres of land, held at \$2.50 per acre, may be entered by the location of a warrant calling for 40 acres and the payment of \$50 in cash; or by locating thereon a warrant for 80 acres, the 40 acres embraced in the entry being received in full satisfaction of the same; or a tract containing 80 acres, rated at \$2.50 per acre, may be entered by the location of two 80-acre warrants, or of one for 160 acres, and so on. It will be required, however, in the entry of a tract held at a greater minimum than \$1.25 per acre, by the location of two or more warrants, that each warrant shall be located upon a specific legal subdivision thereof, which legal subdivision shall be received in full satisfaction of the warrant surrendered therefor; and that the excess in value of the lands, if any there be, shall in each case be paid in cash. Hence, a tract containing 40 acres or less, of double-minimum lands, can not be entered by the location of two 40-acre warrants.

33. A pre-emptor of lands held at \$1.25 per acre may enter the tract embraced in his claim by the location of one, two, or more warrants; but each warrant must be applied to a specific subdivision thereof; that is, a warrant for 40 acres must be located upon a described subdivision containing as nearly as possible 40 acres of land; a warrant for 80 acres upon a tract embracing 80 acres, and so on. Where the pre-emption claim is composed of lands subject to entry at a greater minimum than \$1.25 per acre, the rules set forth in the preceding section will apply.

34. When a subdivision is fractional, a warrant approximating nearest the number of acres embraced therein may be located thereon; but the fractional excess in area must be paid for with cash, and will be conveyed in the same patent with the lands covered by the location of the warrant; a legal subdivision, however, other than those entered by the location of the warrant, will not be regarded as a legitimate fractional excess over such

location, but will be required to constitute a separate entry. Thus, a person will not be permitted to make one entry of a quarter-section of land, by the location of a warrant for 120 acres and a cash payment for the remaining subdivision.

35. Registers and receivers of the local land offices are entitled to the following fees for their services in locating warrants, and the several amounts mentioned must be paid at the time of location:

For a 40-acre warrant, \$1; for a 60-acre warrant, \$1.50; for an 80-acre warrant, \$2; for a 120-acre warrant, \$3; for a 160-acre warrant, \$4.

36. In all cases the patent will be transmitted to the local office where the location was made, for delivery by the register, unless the duplicate certificate of location shall have been previously filed in this office, with a request that the patent be delivered as requested by the person sending the same; and in no case will the patent be delivered, either by this or the local land office, unless upon receipt of the duplicate certificate of location, or of an affidavit of ownership of the lands conveyed by the patent, and of the loss or destruction of the duplicate certificate.

§ 330. *Miscellaneous Provisions.*—37. Bounty land warrants for military services, granted under general laws, are issued only by the commissioner of pensions; and persons supposing themselves entitled to such warrants, should address their applications therefor to that officer.

38. Neither bounty land warrants, nor the lands entered therewith, are liable to be sold, or made subject to the payment of any debt or claim incurred by the warrantees, until after the issue of the patent.

R. S. 2436.

39. Warrants that may have been reissued under the provisions of the revised statutes, section 2441, are subject to the same rules respecting assignments that apply to original warrants; but, in default of an assignment from the warrantee, a decree of title must be obtained from a court of competent jurisdiction, and a transcript thereof appended to the reissued warrant.

40. When an entry, made by the location of a warrant properly assigned to the locator, has been canceled, the warrant will be returned, with a certificate attached thereto, authorizing its relocation by the said locator or his assignees, without a further payment of location fees. In no case, however, will

such a certificate be attached to a warrant the assignments whereof are not such as would receive the approval of this office if presented for that purpose.

41. When a valid entry is withheld from patent, on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office for the district in which the lands are situate an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry.

42. Two warrants can not be substituted for the one originally located, nor will any payment be received that would destroy the identity of the entry.

43. Each warrant transmitted to this office for the purpose of obtaining the commissioner's official approval of the assignments thereof, must be accompanied by the sum of one dollar, the legal fee for a certificate of verification; and each assignment indorsed upon or attached to such warrant must contain the name of an assignee. If a certificate of approval should be attached to the warrant, a blank form of assignment will accompany the same, which may be used in making a subsequent transfer.

Commissioner S. S. Burdett.

§ 331. *Supreme Court Scrip*.—The act of congress approved June 22, 1860, entitled "An act for the final adjustment of private land claims in the states of Florida, Louisiana, and Missouri, and for other purposes" (Stat., vol. 12, p. 85), provides, in its sixth section, "that whenever it shall appear that lands claimed, and the title to which may be confirmed under the provisions of this act, have been sold in whole or in part by the United States prior to such confirmation, or where the surveyor general of the district shall ascertain that the same can not be surveyed and located, the party in whose favor the title is confirmed shall have the right to enter, upon any of the public lands of the United States, a quantity of land equal in extent to that sold by the government; *provided*, that said entry be made only on lands subject to private entry at \$1.25 per acre, and as far as may be possible, in legal divisions and subdivisions, according to the surveys made by the United States."

The provisions of said act were extended and supplemented by the acts of March 2, 1867, and June 10, 1872; and they have been further supplemented by the act of January 28, 1879, en-

titled "An act defining the manner in which certain land scrip may be assigned and located, or applied by actual settlers, and providing for the issue of patents in the name of the locator or his legal representatives," a copy of which is hereto attached.

In pursuance of the provisions of these acts scrip has been issued by this office, the several certificates of which, representing various quantities of land, according to the circumstances of the respective cases, may be located in legal subdivisions on any public land subject to sale at private entry at \$1.25 per acre, any small excess in such subdivisions over the area called for in the scrip to be paid for in money; or they may, under the second section of the act of January 28, 1879, be received from actual settlers in payment of pre-emption claims, or in commutation of homestead claims, even where the same embrace lands subject to entry at the double-minimum price of \$2.50 per acre, in the same manner and to the same extent as is now authorized by law in the case of military bounty land warrants. But the law authorizes no fees to be collected by the district land officers on account of locations made with this scrip.

When such scrip is presented in payment of a pre-emption claim composed of lands subject to entry at \$2.50 per acre, the pre-emptor, in addition to the scrip surrendered, will be required to pay in cash the difference between the value of said scrip at \$1.25 per acre and that of the tract embraced in his claim; or to surrender additional scrip; thus, 160 acres of double-minimum land may be paid for by the surrender of one piece of scrip for 160 acres, and the payment of \$200, or by the surrender of two pieces of scrip for 160 acres each, or one piece for 320 acres. If the value of the scrip should exceed that of the lands entered therewith, the pre-emptor will receive no repayment thereof from the United States; but if the land, at its rated price, should exceed the scrip in value, such excess must be paid for by the locator with cash.

It will be required also, in the location of a tract subject to entry at a greater minimum than \$1.25 per acre, that each piece of scrip shall be located upon a specific subdivision thereof, and that the excess in area of the land, if any, shall be paid for in cash. The same rules will govern in commutations of homestead claims.

The register will in every case require the party desiring to locate to surrender the scrip and make the proper application, when, if no objection should appear, he will allow the location to be made, properly fill up the heading of the application by

inserting the number of the certificate of location, the register and receiver's number, the date of the decree, and the claim for which the certificate of location was issued.¶

He will then issue a certificate of entry in duplicate, one of which he will deliver to the party, to be held by him as his evidence of title until the patent shall be issued.

The locations allowed, he will enter the same on his records, and at the expiration of the month will send up an abstract of all locations allowed during the same. He will forward therewith the applications received, certificates of entry issued during the month, and also the scrip surrendered. Patents will be issued thereupon in regular course, as provided for in the third section of the act of January 28, 1879. By the first section of that act it is declared that this scrip is "assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owners of the scrip." With regard to such form and regulations, the following is prescribed:

Entries with this scrip must be made by the confirmee or confirmees named in the scrip, or his or their duly authorized attorney, in the name of such confirmee or confirmees, or by the assignee or assignees of such confirmee or confirmees, or his or their duly authorized attorney, in the name of such assignee or assignees.

Each assignment must be attested by one or more subscribing witnesses; the mark of a witness will not be respected. Parties in interest as assignees are not recognized as legal attesting witnesses to an assignment, neither can an officer take an acknowledgment of an assignment to himself.

The execution of assignments is required to be acknowledged by the assignor, in the presence of a register or receiver of a land office, a judge or clerk of a court of record when authorized to take acknowledgments, a notary public, justice of the peace, a commissioner of deeds resident in the state from which he derives his appointment, or a commissioner of a circuit court of the United States, who shall certify to the fact of the acknowledgment and to the identity of the assignor, and the official seal of said court, notary public, or commissioner shall be affixed to the certificate. When the acknowledgment is taken before a justice of the peace or other officer without an official seal (except a register or receiver of a land office), it must be accompanied by an additional certificate, under seal of

the proper authority, establishing the official character of the person before whom the acknowledgment was made, and the genuineness of his signature. Powers of attorney must be acknowledged in like manner.

Assignments executed by unmarried females must be accompanied by evidence that they have attained the age of twenty-one years; and when married women assign, their husbands must unite with them in making the transfer.

When assignments are executed by a commissioner or other designated person, alleged to be acting under a decree of court, there must be procured and filed in this office a duly certified copy of such decree, in which all the proceedings had in the case should be recited, and from which it must appear that due notice of the pending suit had been given, by publication or otherwise, to all the parties interested.

When the assignment of this scrip is executed in a foreign country, and the acknowledgment thereof taken by an officer authorized by the laws thereof to perform such duties, the attestation of the American consul in such country should be obtained as to the official character and genuineness of the signature of the person before whom the acknowledgment was made, or if the official character, etc., of such foreign magistrate is attested by a consular agent of such foreign government residing in this country, his official character must be certified by the diplomatic representative of such government in the United States.

When such assignments are executed in a foreign language, duly authenticated translations thereof must be furnished. Secretaries of legation and consular officers of the United States are authorized to take acknowledgments, but they must certify the same under their official seals.

When the persons named as confirmees are described in the scrip as being minors, their assignment thereof must be accompanied by satisfactory evidence that they had attained their majority at the date of the transfer.

When an assignment has been executed and witnessed but not acknowledged, it may be proved in open court; but a certified transcript of the proceedings in the case must be filed in this office. When, however, such assignment has not been properly attested, it must be made anew.

In cases where the assignments, powers, or acknowledgments are written or printed and signed on the back of the certificate,

the words "the within certificate" may be used instead of the full description of such certificate, provided for in these forms.

It will not be practicable in all cases to attach the assignment or power of attorney to each certificate of location, and it will not be required by this office.

When a single assignment or power of attorney covers a number of certificates, such assignment or power may be filed in this office, and will be referred to to perfect the assignment of any of the certificates named therein, whenever they or either of them shall have been located and returned to this office for patenting. Such assignment or power thus filed will also be referred to by this office for the purpose of attaching to any certificate of location named therein a certificate relative to the validity of the certificate of location and the assignment thereof.

Upon the application of any assignee of this scrip, accompanied by the scrip and papers in his possession relative to the assignment thereof, this office will examine said scrip and assignments, and such assignments thereof as are found on the files of this office; and if the scrip be found free from objections, and the assignments sufficient in form, a certificate of approval of such scrip and the assignments thereof will be attached by this office to the scrip thus submitted. Each piece of scrip thus transmitted to this office must be accompanied by the sum of \$1, the legal fee for a certificate of verification.

The fourth section of the act of January 28, 1879, declares, that its provisions respecting the assignment and patenting of scrip, and its application to pre-emption and homestead claims, shall apply to the indemnity certificates of location provided for in the act of the second of June, 1858, entitled "An act to provide for the location of certain confirmed private land claims in the state of Missouri," and for other purposes. The general principles hereinbefore laid down with regard to scrip issued under the act of June 22, 1860, are applicable to the class of certificates issued under the act of June 2, 1858, and you will be governed thereby in dealing with any of the latter presented for location.

Circular instructions of Commissioner J. A. Williamson, February 13, 1879.

§ 332. *Provisions for the Benefit of Soldiers and Sailors of the Late War, their Widows and Minor Orphan Children.*—Sections 2304, 2305, 2306, 2307, 2308, and 2309 of the revised statutes,

for the benefit of soldiers and sailors, their widows and minor orphan children, provide—

1. In section 2304, that every soldier and officer in the army, and every seaman, marine, and officer of the navy, who served for not less than ninety days in the army or navy of the United States, “ during the recent rebellion,” and who was honorably discharged, and has remained loyal to the government, may enter, under the provisions of the homestead law, 160 acres of the public land, to be taken, if desired, from the class of double-minimum lands.

2. In section 2305, that the time of his service, or the whole term of his enlistment if the party was discharged on account of wounds or disability incurred in the line of duty, shall be deducted from the period of five years, during which, as per section 2291, the claimant must, to perfect title, reside upon and cultivate the entered tract, but with the proviso that the party shall, in every case, reside upon, improve, and cultivate his homestead for a period of at least one year after he shall have commenced his improvements.

3. That any person entitled to the benefits of section 2304, who had prior to the twenty-second of June, 1874, made a homestead entry of less than 160 acres, may enter an additional quantity of land sufficient to make, with the previous entry, 160 acres.

4. That the widow, if unmarried, or in case of her death or marriage, then the minor orphan children, of a person who would be entitled to the benefits of section 2304, may enter land under its provisions, with the additional privilege accorded, that if the person died during his term of enlistment, the widow or minor children shall have the benefit of the whole term of enlistment.

5. That any person entitled to the benefit of section 2304 may file his claim for a tract of land through an agent, and shall have six months thereafter within which to make his entry and commence his settlement and improvement upon the land.

The following is the course of proceedings for parties to avail themselves of the benefits of these sections of the revised statutes in making homestead entries:

1. On the party producing the proper proof of his right to do so, immediate entry of the tract desired may be made; but if the party so elect, he may file a declaration to the effect that he claims a specified tract of land as his homestead, and that he takes it for actual settlement and cultivation. The register and receiver will number the declarations so filed in a separate series,

according to the order of filing, enter them on their records, and with their monthly returns forward an abstract, to embrace all declarations of this class filed with them during the month.

Thereafter, at any time within six months from the date of filing, the party may come forward, make his entry of the land, and commence his settlement and improvement. Should the party present his declaration through an agent, as authorized by section 2309, said agent must produce a duly executed power of attorney from the principal desiring to make the entry, who will be bound by the selection his agent may make, the same as though made by himself. Where the party has failed to make entry within six months from the date of filing, he is not thereby debarred from making entry of the tract filed for, unless some adverse right intervened; and if so, he may enter some other tract that is still vacant.

2. The claims of widows and minor orphan children may be initiated by declaration, as above. Minor orphan children can act only by their duly appointed guardians, who must file certified copies of the powers of guardianship, which must be transmitted to this office by the registers and receivers, with their abstracts of declarations. The law does not require, as a condition to enjoying its benefits, that the party should first file a declaratory statement, and, as before stated, immediate entry may be made.

3. Where a party entitled desires to make an additional entry of a quantity which, with his original entry, shall not exceed 160 acres, it is required that a full recital of military service be presented to this office, with due proof of the identity of the party making the claim, and with proper reference to his original homestead entry, giving the name of the district office, date and number of entry, and description of the land. In addition, a detailed statement, under oath, must be filed by the party in interest, setting forth the facts respecting his right to make the entry, and containing his declaration that he has not in any manner exercised his right, either by previous entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired. He must also declare, under oath, that he has made full compliance with the homestead law in the matter of residence upon, cultivation and improvement of, his original homestead entry, and should further recite whether or not he has proved up his claim and received a patent of the land.

When these papers are filed and examined, they will, if

found satisfactory, be returned with a certificate attached, recognizing the right of the party to make additional entry under the law; and when presented with a proper application at any district land office, either by the party entitled or his agent or attorney, they will be accepted by the register and receiver, and forwarded with the entry papers to this office in the usual manner.

Where the party's first entry has been consummated, the register and receiver will require him to make application and to pay the same fee and commissions as in cases of original entry; the receiver will issue his receipt for the money paid, and these papers will receive the current date and the proper numbers in their homestead series. Then, to complete the transaction—it being an object for the convenience of business that the additional entry papers, and the final papers therefor, in such cases shall be kept separate and distinct—the party will make payment of the usual final commissions on the entered tract, for which the receiver will issue his receipt; the register will thereupon issue his final certificate for the additional tract, the receipt and certificate to bear their proper numbers in the final homestead series, likewise a reference to the original entry and to the final certificate thereon by their number, and also by their district where the party's first entry shall have been made in a different district.

In case the party has not made proof on his original homestead entry when he applies for additional land, he will be allowed to make the additional entry on proper application, as above stated, and paying the usual fee and commissions, for which the receiver will issue his receipt, the papers to receive their proper numbers in the homestead series, with the reference thereon to the original entry.

Thereafter, when the party shall make final proof on the original entry, he will be required to pay the final commissions on both entries, when a final receipt will be issued for the money, and thereupon a final certificate issued to call both for the tract in the original entry and the additional tract. On these papers the register and receiver will make a reference to the original and the additional entry, and on them one patent will issue for both; yet where it happens that the original entry and the additional entry are made in different land districts, this rule must be departed from so far as regards the issuing of one final certificate and receipt for both.

§ 333. The following proof will be required of parties apply-

ing for the benefits of sections 2304, 2305, and 2307, in addition to the prescribed affidavit of the applicant:

1. Certified copy of certificate of discharge, showing when the party enlisted and when he was discharged, or the affidavit of two respectable disinterested witnesses corroborative of the allegations contained in the prescribed affidavit on these points, or, if neither can be procured, the party's affidavit to that effect.

2. In case of widows, the prescribed evidence of military service of the husband, as above, with affidavit of widowhood, giving date of the husband's death.

3. In case of minor orphan children, in addition to the prescribed evidence of military service of the father, proof of death or marriage of the mother. Evidence of death may be the testimony of two witnesses, or certificate of a physician duly attested. Evidence of marriage may be certified copy of marriage certificate, or of the record of same, or testimony of two witnesses to the marriage ceremony.

The register and receiver will be allowed to charge one dollar each for receiving and filing the initiatory declaration of the parties in cases where such declarations are filed. This fee the receiver will account for in the usual manner, indicating the same in his account as fees for "homestead declarations," which will be charged against the maximum of \$3,000 now allowed by law.

In the states and territories for which 50 per centum additional is allowed by the twelfth subdivision of section 2238 of the revised statutes, the additional allowance will apply to the fee herein named, viz.: California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana.

§ 334. *Provisions for the Benefit of Indians.*—The fifteenth and sixteenth sections of the act of March 3, 1875, extends the benefits of the homestead act of May 20, 1862, and the acts amendatory thereof (now embodied in sections 2290, 2291, 2292, and 2295 to 2302, inclusive, of the revised statutes), to any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, with the exception that the provisions of the eighth section of said act of 1862 (section 2301 of the revised statutes) shall not be held to apply to entries made thereunder, and with the proviso that the title to lands acquired by any Indian by virtue thereof shall not be subject to alienation or incumbrance, either by

voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

An Indian desiring to enter public land under this act must make application to the register and receiver of the proper district land office; also an affidavit setting forth the fact of his Indian character; that he was born in the United States; that he is the head of a family or has arrived at the age twenty-one years; that he has abandoned his tribal relations and adopted the habits and pursuits of civilized life; and this must be corroborated by the affidavits of two or more disinterested witnesses.

If no objection appears, the register and receiver will then permit him to enter the tract desired according to existing regulations, so far as applicable, under the homestead law, the register writing across the face of the application the words, "Indian homestead—act of March 3, 1875;" they will note the entry on their records and make returns thereof to this office, with which they will send the affidavits submitted. It will be observed that the provisions of the eighth section of the act of May 20, 1862 (section 2301 of the revised statutes), which admits of the commuting of homestead to cash entries, do not apply to this class of homesteads.

All lands obtained under the homestead laws are exempt from liability for debts contracted prior to the issuing of patent therefor.

The act of congress of March 3, 1877, making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1878, provides: "That public lands situated in states in which there are no land offices may be entered at the general land office, subject to the provisions of law touching the entry of public lands; and that the necessary proofs and affidavits required in such cases may be made before some officer competent to administer oaths, whose official character shall be duly certified by the clerk of a court of record; and moneys received by the commissioner of the general land office for lands entered by cash entry shall be covered into the treasury."

Circular of October 1, 1880.

CHAPTER XVIII.

BOUNTY LAND WARRANTS AND SCRIP.

- § 335. Bounty Lands for Soldiers in Certain Wars.
- § 336. Certain Classes of Persons in the Mexican War, their Widows, etc., Entitled to Forty Acres.
- § 337. Militia and Volunteers in Service since 1812.
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- § 339. Period of Captivity Added to Actual Service.
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- § 341. Widows of Persons Entitled.
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§ 335. *Bounty Lands for Soldiers in Certain Wars.*—Each of the surviving, or the widow or minor children of deceased, commissioned and non-commissioned officers, musicians, or privates, whether of regulars, volunteers, rangers, or militia, who performed military service in any regiment, company, or detachment, in the service of the United States, in the war with Great Britain, declared on the eighteenth day of June, 1812, or in any of the Indian wars since 1790, and prior to the third of March, 1850, and each of the commissioned officers who was engaged in the military service of the United States in the war with Mexico, shall be entitled to lands as follows: Those who engaged to serve twelve months or during the war, and actually served nine months, shall receive 160 acres, and those who engaged to serve six months, and actually served four months, shall receive 80 acres, and those who engaged to serve for any or an indefinite period, and actually served one month, shall receive 40 acres; but wherever any officer or soldier was honorably discharged in consequence of disability contracted in the service, before the expiration of his period of service, he shall receive the amount to which he would have been entitled if he had served the full period for which he had engaged to serve. All the persons enumerated in this section, who enlisted in the regular army, or were mustered in any volunteer company for a period of not less than twelve months, and who served in the war with Mexico and received an honorable discharge, or who were killed or died of wounds received or sickness incurred in the course of such service, or were discharged before the expiration of the term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate

or warrant for 160 acres of land; or at option treasury scrip for \$100 bearing interest at six per cent. per annum, payable semi-annually, at the pleasure of the government. In the event of the death of any one of the persons mentioned in this section during service, or after his discharge and before the issuing of a certificate or warrant, the warrant or scrip shall be issued in favor of his family or relatives; first, to the widow and his children; second, his father; third, his mother; fourth, his brothers and sisters.

9 Stat. 125, 126, 520; R. S. 2418.

§ 336. *Certain Classes of Persons in the Mexican War, their Widows, etc., Entitled to Forty Acres.*—The persons enumerated in the preceding section received into service after the commencement of the war with Mexico, for less than twelve months, and who served such term, or were honorably discharged, are entitled to receive a certificate or warrant for forty acres, or scrip for twenty-five dollars if preferred, and in the event of the death of such person during service, or after honorable discharge before the eleventh of February, 1847, the warrant or scrip shall issue to the wife, child, or children, if there be any, and if none, to the father, and if no father, to the mother, of such soldier.

9 Stat. 126; R. S. 2419.

§ 337. *Militia and Volunteers in Service since 1812.*—Where the militia, or volunteers, or state troops of any state or territory, subsequent to the eighteenth day of June, 1812, and prior to March 22, 1852, were called into service, the officers and soldiers thereof shall be entitled to all the benefits of section 2428 R. S., upon proof of service as therein required.

10 Stat. 4; R. S. 2420; 2 Op. Att. Gen. 501.

§ 338. *Persons not Entitled under Preceding Sections.*—No person shall take any benefit under the provisions of the three preceding sections, if he has received, or is entitled to receive, any military land bounty under any act of congress passed prior to the twenty-second March, 1852.

9 Stat. 520; R. S. 2421.

§ 339. *Period of Captivity Added to Actual Service.*—The period during which any officer or soldier remained in captivity with the enemy shall be estimated and added to the period of his actual service, and the person so retained in captivity shall receive land under the provisions of sections 307 and 309, in the same manner that he would be entitled in case he had

entered the service for the whole term made up by the addition of the time of his captivity, and had served during such term.

9 Stat. 520; R. S. 2422.

§ 340. *Warrant and Patent to Issue, when.*—Every person for whom provision is made by sections 2418 and 2420 R. S., shall receive a warrant from the department of the interior for the quantity of land to which he is entitled; and, upon the return of such warrant, with evidence of the location thereof having been legally made to the general land office, a patent shall be issued therefor.

9 Stat. 520; R. S. 2423.

§ 341. *Widows of Persons Entitled.*—In the event of the death of any person, for whom provision is made by sections 335 and 337 of this book, and who did not receive bounty land for his services, a like warrant shall issue in favor of his widow, who shall be entitled to 160 acres of land in case her husband was killed in battle; nor shall a subsequent marriage impair the right of any widow to such warrant, if she be a widow at the time of making her application.

9 Stat. 520; R. S. 2424.

§ 342. *Additional Bounty Lands, etc.*—Each of the surviving persons specified in the classes enumerated in the following section, who has served for a period of not less than fourteen days, in any of the wars in which the United States have been engaged since the year 1790, and prior to the third day of March, 1855, shall be entitled to receive a warrant from the department of the interior, for 160 acres of land; and, where any person so entitled has, prior to the third day of March, 1855, received a warrant for any number of acres less than 160, he shall be allowed a warrant for such quantity of land only as will make, in the whole, with what he may have received prior to that date, 160 acres.

10 Stat. 701, 702; R. S. 2425.

§ 343. *Classes under Last Section Specified.*—The classes of persons embraced as beneficiaries under the preceding section are as follows, namely:

1. Commissioned and non-commissioned officers, musicians, and privates, whether of the regulars, volunteers, rangers, or militia, who were regularly mustered into the service of the United States.

2. Commissioned and non-commissioned officers, seamen, ordinary seamen, flotilla-men, marines, clerks, and landsmen in the navy.

3. Militia, volunteers, and state troops of any state or territory, called into military service, and regularly mustered therein, and whose services have been paid by the United States.

4. Wagon-masters and teamsters who have been employed under the direction of competent authority in time of war, in the transportation of military stores and supplies.

5. Officers and soldiers of the revolutionary war, and marines, seamen, and other persons in the naval service of the United States during that war.

6. Chaplains who served with the army.

7. Volunteers who served with the armed forces of the United States in any of the wars mentioned, subject to military orders, whether regularly mustered into the service of the United States or not.

10 Stat. 701; 11 Id. 8, 9; R. S. 2426.

§ 344. *What Classes of Persons Entitled under Section 2425 R. S., without Regard to Length of Service.*—The following classes of persons are included as beneficiaries under section 2425 R. S., without regard to the length of service rendered:

1. Any of the classes of persons mentioned in section 343 of this book, who have been actually engaged in any battle in any of the wars in which this country has been engaged since 1790, and prior to March 3, 1855.

2. Those volunteers who served at the invasion of Plattsburgh in September, 1814.

3. The volunteers who served at the battle of King's Mountain, in the revolutionary war.

4. The volunteers who served in the battle of Nickojack against the confederate savages of the south.

5. The volunteers who served at the attack on Lewistown, in Delaware, by the British fleet, in the war of 1812.

10 Stat. 702; R. S. 2427.

§ 345. *Widows and Children of Persons Entitled under Section 2425 R. S.*—In the event of the death of any person who would be entitled to a warrant, as provided in section 314, leaving a widow, or, if no widow, a minor child, such widow or such minor child shall receive a warrant for the same quantity of land that the decedent would be entitled to receive, if living on the third day of March, 1855.

10 Stat. 702; R. S. 2428.

§ 346. *Subsequent Marriage of Widow.*—A subsequent mar-

riage shall not impair the right of any widow, under the preceding section, if she be a widow at the time of her application.

10 Stat. 702; R. S. 2429.

§ 347. *Minors under Section 317.*—Persons within the age of twenty-one years on the third day of March, 1855, shall be considered minors within the intent of section 317.

10 Stat. 702; R. S. 2430.

§ 348. *Proof of Service.*—Where no record evidence of the service for which a warrant is claimed exists, parol evidence may be admitted to prove the service performed, under such regulations as the commissioner of pensions may prescribe.

10 Stat. 702; 11 Id. 8; R. S. 2431.

§ 349. *Former Evidence of Right to Bounty Land to be Received in Certain Cases.*—Where certificate or a warrant for bounty land for any less quantity than 160 acres has been issued to any officer or soldier, or to the widow or minor child of any officer or soldier, the evidence upon which such certificate or warrant was issued shall be received to establish the service of such officer or soldier in the application of himself, or of his widow or minor child, for a warrant for so much land as may be required to make up the full sum of 160 acres, to which he may be entitled under the preceding section, on proof of the identity of such officer or soldier, or, in case of his death, of the marriage and identity of his widow, or, in case of her death, of the identity of his minor child. But if, upon a review of such evidence, the commissioner of pensions is not satisfied that the former warrant was properly granted, he may require additional evidence, as well of the term as of the fact of service.

11 Stat. 8; R. S. 2432.

§ 350. *Allowance of Time of Service for Distance from Home to Place of Muster or Discharge.*—When any company, battalion, or regiment, in an organized form, marched more than twenty miles to the place where they were mustered into the service of the United States, or were discharged more than twenty miles from the place where such company, battalion, or regiment was organized, in all such cases, in computing the length of service of the officers and soldiers of any such company, battalion, or regiment, there shall be allowed one day for every twenty miles from the place where the company, battalion, or regiment was organized to the place where the same was mustered into the service of the United States, and one day for every twenty miles from the place where such company, battalion, or regiment was

discharged, to the place where it was organized, and from whence it marched to enter the service, provided that such march was in obedience to the command or direction of the president, or some general officer of the United States commanding an army or department, or the chief executive officer of the state or territory by which such company, battalion, or regiment was called into service.

10 Stat. 4; 11 Id. 9; R. S. 2433.

§ 351. *Indians Included.*—The provisions of all the bounty land laws shall be extended to Indians, in the same manner and to the same extent as to white persons.

10 Stat. 702; R. S. 2434.

§ 352. *Former Evidence of Right to a Pension to be Received in Certain Cases on Application for Bounty Land.*—Where a pension has been granted to any officer or soldier, the evidence upon which such pension was granted shall be received to establish the service of such officer or soldier in his application for bounty land; and upon proof of his identity as such pensioner, a warrant may be issued to him for the quantity of land to which he is entitled; and in case of the death of such pensioned officer or soldier, his widow shall be entitled to a warrant for the same quantity of land to which her husband would have been entitled, if living, upon proof that she is such widow; and in case of the death of such officer or soldier, leaving a minor child and no widow, or where the widow may have deceased before the issuing of any warrant, such minor child shall be entitled to a warrant for the same quantity of land as the father would have been entitled to receive if living, upon proof of the decease of father and mother. But if, upon a review of such evidence, the commissioner of pensions is not satisfied that the pension was properly granted, he may require additional evidence, as well of the term as of the fact of service.

11 Stat. 8; R. S. 2435.

§ 353. *Deserters not Entitled to Bounty Land.*—No person who has been in the military service of the United States shall, in any case, receive a bounty land warrant, if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service.

9 Stat. 520; 10 Id. 701; R. S. 2438.

§ 354. *Lost Warrants, Provisions for.*—When a soldier of the regular army, who has obtained a military land warrant, loses

the same, or such warrant is destroyed by accident, he shall, upon proof thereof to the satisfaction of the secretary of the interior, be entitled to a patent in like manner as if the warrant was produced.

3 Stat. 317; R. S. 2439.

§ 355. *Discharges; Omissions and Loss of, Provided for.*—In all cases of discharge from the military service of the United States of any soldier of the regular army, when it appears to the satisfaction of the secretary of war that a certificate of faithful services has been omitted by the neglect of the discharging officer, by misconstruction of the law, or by any other neglect or casualty, such omission shall not prevent the issuing of the warrant and patent as in other cases. And when it is proved that any soldier of the regular army has lost his discharge and certificate of faithful service, the secretary of war shall cause such papers to be furnished such soldier as will entitle him to his land warrant and patent, provided such measure is justified by the time of his enlistment, the period of service, and the report of some officer of the corps to which he was attached.

3 Stat. 317; R. S. 2440.

§ 356. *New Warrant Issued in Lieu of Lost Warrant.*—Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the secretary of the interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bounty land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been or may be reissued, the original warrant, in whose ever hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

12 Stat. 90; 18 Id. 111; R. S. 2441.

§ 357. *Regulations by Secretary of Interior.*—The secretary of the interior is required to prescribe such regulations for carrying the preceding section into effect as he may deem necessary and proper in order to protect the government against imposi-

tion and fraud by persons claiming the benefit thereof; and all laws and parts of laws for the punishment of frauds against the United States are made applicable to frauds under that section.

12 Stat. 91; 18 Id. 111; R. S. 2442.

§ 358. *Death of Claimant after Establishing Right and before Issuing of Warrant.*—When proof has been or hereafter is filed in the pension office, during the life-time of a claimant, establishing, to the satisfaction of that office, his right to a warrant for military services, and such warrant has not been or may not be issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

11 Stat. 308; R. S. 2444.

§ 359. *When Proofs may be Filed by Legal Representatives.*—The legal representatives of a deceased claimant for a bounty land warrant, whose claim was filed prior to his death, may file the proofs necessary to perfect such claim.

15 Stat. 336; R. S. 2445.

§ 360. *Military Bounty Land Warrants and Locations Assignable.*—All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

10 Stat. 3; 11 Id. 309; R. S. 2414.

§ 361. *Warrants Located on Double-minimum Lands, Excess Paid in Cash.*—The warrants which have been or may hereafter be issued in pursuance of law may be located according to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than \$1.25 per acre, the locator shall pay to the United States in cash

the difference between the value of such warrants at \$1.25 per acre and the tract of land located on. But where such tract is rated at \$1.25 per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

10 Stat. 3; R. S. 2415.

§ 362. *Claims for Bounty Lands in Virtue of Certain Acts Named, etc.*—In all cases of warrants for bounty lands, issued by virtue of an act approved July 27, 1842, and of two acts approved January 27, 1835, therein and thereby revised, and of two acts to the same intent, respectively, approved June 26, 1848, and February 8, 1854, for military services in the revolutionary war, or in the war of 1812 with Great Britain, which remained unsatisfied on the second day of July, 1864, it is lawful for the person in whose name such warrant issued, his heirs or legal representatives, to enter in quarter-sections, at the proper local land office in any of the states or territories, the quantity of the public lands subject to private entry which he is entitled to under such warrant.

13 Stat. 378; R. S. 2416.

§ 363. *Same Subject.*—All warrants for bounty lands referred to in the preceding section may be located at any time, in conformity with the general laws in force at the time of such location.

13 Stat. 379; R. S. 2417.

§ 364. *Sales, Mortgages, Letters of Attorney, etc., Made before Issue of Warrant to be Void.*—All sales, mortgages, letters of attorney, or other instruments of writing, going to affect the title or claim to any warrant issued or to be issued, or any land granted or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant, or the land obtained thereby, be in any wise affected by, or charged with, or subject to, the payment of any debt or claim incurred by any officer or soldier, prior to the issuing of the patent.

9 Stat. 521; R. S. 2436.

§ 365. *Warrants to be Located Free of Expense by Commissioner of Land Office, etc.*—It shall be the duty of the commissioner of the general land office, under such regulations as may be prescribed by the secretary of the interior, to cause to be located free of expense any warrant which the holder may transmit to the general land office for that purpose, in such

state or land district as the holder or warrantee may designate, and upon good farming land, so far as the same can be ascertained from the maps, plats, and field-notes of the surveyor, or from any other information in the possession of the local office, and, upon the location being made, the secretary shall cause a patent to be transmitted to such warrantee or holder.

9 Stat. 521; R. S. 2437.

§ 366. *Mode of Issuing Patents to the Heirs of Persons Entitled to Bounty Lands.*—In all cases where an officer or soldier of the revolutionary war, or a soldier of the war of 1812, who was entitled to bounty land, has died before obtaining a patent for the land, and where application is made by a part only of the heirs of such deceased officer or soldier for such bounty land, it shall be the duty of the secretary of the interior to issue the patent in the name of the heirs of such deceased officer or soldier, without specifying each; and the patent so issued in the name of the heirs generally shall inure to the benefit of the whole, in such proportions as they are severally entitled to by the laws of descent in the state or territory where the officer or soldier belonged at the time of his death.

5 Stat. 650; R. S. 2443.

§ 366a. *Relocation of Military Bounty Land Warrants in Cases of Error.*—Where an actual settler on the public lands has sought or hereafter attempts to locate the land settled on and improved by him, with a military bounty land warrant, and where, from any cause, an error has occurred in making such location, he is authorized to relinquish the land so erroneously located, and to locate such warrant upon the land so settled upon and improved by him, if the same then be vacant, and if not, upon any other vacant land, on making proof of those facts to the satisfaction of the land officers, according to such rules and regulations as may be prescribed by the commissioner of the general land office, and subject to his final adjudication.

10 Stat. 256; R. S. 2446.

§ 367. *Authorizing the Issuance of Sioux Half-breed Scrip.*—The president is authorized to exchange with the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of lake Pepin and the Mississippi river, Minnesota, which was set apart and granted for their use and benefit, by the ninth article of the treaty of Prairie du Chien, of the fifteenth day of July, 1830; and for that purpose he is authorized to cause

to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the commissioner of the general land office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements; *provided*, that said certificates or scrip shall not embrace more than 640 nor less than 40 acres each; and *provided*, that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation; and *provided further*, that no transfer or conveyance of any of said certificates or scrip shall be valid.

10 Stat. 304.

§ 367a. *Certificates of Location or Scrip to Issue in Satisfaction of Confirmed Private Land Claims Which can not be Located.*—Where any private land claim was confirmed by congress prior to June 2, 1858, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, certificates of location for a quantity of land equal to that so confirmed and unsatisfied; which certificates of location or scrip shall be subdivided according to the request of the confirmer or confirmeres, and, as nearly as practicable, in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate

the same in his own name upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding \$1.25 per acre, and shall be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty land warrants.

11 Stat. 294, 295; 20 Id. 274, 275.

§ 368. *Issuance and Location of Judicial Scrip in Lieu of Confirmed Private Land Claims.*—Whenever, in cases prosecuted under the acts of congress of June 22, 1860, March 2, 1867, and the first section of the act of June 10, 1872, providing for the adjustment of private land claims in the States of Florida, Louisiana, and Missouri, the validity of the claim has been or shall be hereafter recognized by the supreme court of the United States, and the court has decreed that the plaintiff or plaintiffs is or are entitled to enter a certain number of acres upon the public lands of the United States, subject to private entry at \$1.25 per acre, or to receive certificate of location for as much of the land the title to which has been established as has been disposed of by the United States, certificate of location shall be issued by the commissioner of the general land office, attested by the seal of said office, to be located as provided for in the sixth section of the aforesaid act of congress of June 22, 1860, or applied according to the provisions of this section; and said certificate of location or scrip shall be subdivided according to the request of the confirmer or confirmeres, and, as nearly as practicable, in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be, and are hereby declared to be, assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the scrip in his own name; such scrip shall be received from actual settlers only in payment of pre-emption claims, or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty land warrants.

12 Stat. 85, 86; 20 Id. 274, 275.

§ 369. *Patent to Issue on Scrip Locations.*—The register of the proper land office, upon any certificate issued under the two

preceding sections being located, shall issue, in the name of the party making the location, a certificate of entry, upon which, if it shall appear to the satisfaction of the commissioner of the general land office that such certificate has been fairly obtained, according to the true intent and meaning of said sections, a patent shall issue, as in other cases, in the name of the locator or his legal representative.

12 Stat. 85, 86; 20 Id. 274, 275.

§ 370. *Porterfield Scrip, how Located.*—The warrants issued to William Kinney and Thomas J. Michie, executors of the last will and testament of Robert Porterfield, deceased, pursuant to the act of congress approved April 11, 1860, may be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location within any of the states or territories of the United States where the minimum price for the same shall not exceed the sum of \$1.25 per acre; to be selected and located in conformity with the legal subdivisions of the public surveys, and appropriated according to the directions contained in the last will and testament of the said Robert Porterfield, deceased, in the same manner and for the purposes directed in regard to the lands which were lost by the said legal representatives in the action with Clark and others, as decided by the supreme court of the United States.

12 Stat. 836.

§ 371. *Valentine Scrip, how Located.*—The scrip issued to Thomas B. Valentine, pursuant to an act of congress approved April 5, 1872, may be located by said Valentine or his legal representatives upon any of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys, and patents shall be allowed therefor.

17 Stat. 649.

§ 372. *Providing for Issuing and Location of Coles Scrip.*—The commissioner of the general land office is authorized and required to issue warrants, in lieu of Iowa swamp-land indemnity certificates numbered 92 and 93, to Robert Coles, in accordance with the legal subdivisions of the public lands, in quantities not less than 80 acres, which may be located by the said Robert Coles, his heirs or assigns, upon any of the public

lands not mineral, or coal, or double-minimum lands, subject to entry by pre-emption, or under the provisions of the homestead act; which warrants may also be received from actual settlers in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty land warrants; *provided*, that said locations do not interfere with prior pre-emption or homestead rights; and patents may issue therefor the same as provided for military bounty land warrants or lands sold for cash.

20 Stat. 536.

§ 373. *Chippewa Half-breed Scrip, Red Lake and Pembina Bands.*—In lieu of the lands provided for the mixed bloods of the Red Lake and Pembina bands of Chippewa Indians by article 8 of the treaty concluded at the Old Crossing of Red Lake river, on October 2, 1863, scrip shall be issued to such of said mixed bloods as shall so elect, which shall entitle the holder to a like amount of land, and may be located upon any of the lands ceded by said treaty, but not elsewhere, and shall be accepted by said mixed bloods in lieu of all future claims for annuities.

13 Stat. 669, 690; Revised Indian Treaties, 256, 259.

§ 374. *Chippewa Half-breed Scrip, Lake Superior Bands.*—Each head of a family or single person over twenty-one years of age on September 30, 1854, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to 80 acres of land, to be selected by them under the direction of the president, and which shall be secured to them by patent in the usual form.

10 Stat. 1110.

§ 375. *Certain Lands Located in Good Faith by Claims Arising under Treaty of September 30, 1854, may be Purchased, etc.*—The secretary of the interior is authorized to permit the purchase, with cash or military bounty land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September 30, 1854, at such price per acre as he deems equitable and proper, but not at a less price than \$1.25 per acre, and the owners and holders of such claims in good faith are also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned; but it must be shown to the satisfaction of the secretary of the interior that

such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

17 Stat. 340; R. S. 2368.

§ 376. *Scrip may be Issued to Owners of Military Land Warrants, Issued by the United States in Satisfaction of Claims for Bounty Land for Service during Revolutionary War, upon Surrender thereof to the Secretary of the Interior.*—The owners of military land warrants issued by the United States in satisfaction of claims for bounty land for service during the revolutionary war, their heirs and assigns, shall be, and they are hereby, authorized to surrender, to the secretary of the interior, such of their warrants for the said land bounties as shall remain unsatisfied, in whole or in part, and to receive certificates or scrip for the same, at any time before the first day of September, 1835, which certificate or scrip shall be issued by the said secretary, and signed by him and countersigned by the commissioner of the general land office in the following manner, that is to say: There shall be a separate certificate or scrip, for such sum as shall, at the time of issuing the same, be equal to the then minimum price of each quantity of 80 acres of land due by such warrant, and remaining unsatisfied at the time of such surrender, and a like certificate or scrip for such sum as, at the time, shall be equal to the minimum price of the quantity that shall so remain unsatisfied, of any such warrant after such subdivisions of the amount into quantities of 80 acres. All certificates or scrip issued in virtue of any warrant granted after the thirtieth day of May, 1830, shall be issued to the party originally entitled thereto, or his heir or heirs, devisee or devisees, as the case may be. The certificate or scrip issued under the provisions of this section shall be receivable in payment for any of the public lands liable to sale at private entry; but such certificate or scrip shall not entitle the holder to enter or purchase any settled or occupied lands, without the written consent of such settlers or occupants as may be actually residing on said lands at the time the same shall be entered or applied for. All such certificates or scrip shall be assignable, by indorsement thereon, attested by two witnesses.

4 Stat. 422, 423, 424, 665, 770.

§ 377. *Secretary of Interior may, upon Proof, Issue Scrip in Satisfaction of Certain Outstanding Virginia Land Warrants.*—All outstanding military land warrants or parts of warrants issued

upon allowances made by the executive of the commonwealth of Virginia prior to the first day of March, 1852, for military services performed by the officers and soldiers, seamen or marines, of the Virginia state and continental lines in the army or navy of the revolution, may be surrendered to the secretary of the interior, who, upon being satisfied, by a revision of the proofs or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said commonwealth, for military services so rendered, and that the same comes within the provisions recognized by the department of the interior in the execution of the provisions of "An act making further provision for the satisfaction of Virginia land warrants," approved August 31, 1852, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, for the whole or any portion thereof yet unsatisfied, at the rate of \$1.25 for each acre mentioned in the warrant thus surrendered and which remains unsatisfied, which scrip shall be receivable in payment for any lands owned by the United States subject to sale at private entry; and said scrip shall, moreover, be assignable by indorsement attested by two witnesses. In issuing such scrip, the secretary is authorized, when there are more persons than one interested in the same warrant, to issue to each person scrip for his or her portion of the warrant; and where infants or *femes covert* may be entitled to any scrip, the guardian of the infant and the husband of the *feme covert* may receive and sell or locate the same; *provided*, that no less than a legal subdivision shall be entered and paid for by the scrip issued in virtue of this section; *and provided further*, that no warrant or part of warrant shall be satisfied in scrip, founded or issued on any allowance made by the executive of Virginia since the first day of March, 1852.

10 Stat. 143; 12 Id. 84.

CHAPTER XIX.

GENERAL GRANTS TO STATES AND TERRITORIES.

- § 378. Five Kinds of Grants—Of Saline Lands.
- § 379. Of Swamp and Overflowed Lands.
- § 380. For Public or Common Schools.
- § 381. Indemnity Selections.
- § 382. For Seminaries or Universities.
- § 383. For Agricultural and Mechanical Colleges.
- § 384. State Selections in General.
- § 385. Decision of Secretary Final as to Swamp Lands.
- § 387. State Selections in California.
- § 388a. Lakes—Navigable Waters of United States.
- § 389. Lakes not Navigable.
- § 390. Unauthorized Certification.
- § 391. Act of July 23, 1866.
- § 392. Act of March 3, 1853.

§ 378. There are five distinct and separate grants to states and territories:

1. Of saline lands.
2. Of swamp and overflowed lands.
3. Grants for public or common schools.
4. Grants for seminaries or universities.
5. Grants for agricultural and mechanical colleges.

Saline Lands.—The acts for the admission of all the public land states up to Nevada gave to them all the salines, not exceeding twelve in number, in the respective states, together with six sections of land with each spring for school purposes and public improvements. The act of January 12, 1877, provided a new mode of proceeding, by which such lands are rendered subject to disposal as other public lands. Under its provisions, a hearing is ordered, and witnesses are examined as to the character of the land in question, and the testimony taken at the hearing is transmitted to the general land office for its decision. Should the tracts be adjudged agricultural, they will be subject to disposal as such. Should the tracts be adjudged saline in character, they would be offered at public sale to the highest bidder for cash, at a price of not less than \$1.25 per acre. In case they are not sold, the same will be subject to

private sale, at a price not less than \$1.25 per acre, in the same manner as other public lands are sold. This law is not operative in the territories, nor in the states of Mississippi, Florida, Louisiana, California, and Nevada, because their former saline grants have not as yet been filed.

§ 379. *Swamp Lands*.—By the act of September 28, 1850, there was granted to the state of Arkansas, and each of the other states of the Union, all of the swamp and overflowed lands which may be or are found unfit for cultivation. And the act continues: "The proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclamation of said lands by means of levees and drains."

As early as 1851 this act was construed by the secretary of the interior as a grant *in presenti*, and this construction has since been adopted by the courts.

By act of March 3, 1855, congress approved all sales which had been made by the government, and provided indemnity in cash for such sales.

By the acts of March 4, 1849, September 28, 1850, March 2, 1855, March 3, 1857, and March 12, 1860, congress not only conceded swamp and overflowed lands "in place," but when lands of this class had been sold as arable, or located with bounty warrants, the statute authorized the department in the one case to pay over in money to the state authorities the amount of such sales, and in the other to give to the state an equivalent in public lands.

The act of March 12, 1860, applies to the states of Minnesota and Oregon, and qualifies materially the general rule in reference to swamp-land grants. With the exception of California, Michigan, Minnesota, and Wisconsin, selections of swamp lands are made by agents of the state, and proof of the swampy character of the land furnished.

The tracts inuring to California are determined by three methods under the fourth section of the act of July 23, 1866 (14 Stats. p. 218). Lists of swamp lands free from conflict are made out by the commissioner, and submitted to the secretary of the interior with a recommendation that they be approved.

When the lists have been approved by the secretary, they are returned to the land office and duplicate copies of the same are made out, one of which is transmitted to the governor of the state, with a statement that on receipt of his request patent

will issue to the state for the lands. The other list is transmitted to the register and receiver of the particular land office.

Circular of April 18, 1882.

The swamp-land acts have been the subject of much complaint, of fraud, actual fraud, and deceit. Their execution has been attended with great difficulty, and lists certified thereunder have required constant and most exact scrutiny. Millions of acres have been listed as swamp lands, which are now suspended for investigation. Special agents have been and are now employed to unearth frauds under this act, against the government.

On the thirtieth of June, 1880, California was entitled to 322,879 acres more of swamp land than it had as yet received patents for.

Public Domain, p. 222.

§ 380. *For Public or Common Schools.*—Before the adoption of the constitution of the United States, to wit, on the tenth day of May, 1775, an ordinance for disposing of land in the western territory was adopted in the congress of the confederation, which, amongst other things, provided, "There shall be reserved the lot number 16 of every township for the maintenance of public schools within said township."

The provisions of this ordinance was the inception of the present rule of reservation of certain sections of land for school purposes. The endowment was the subject of much legislation in the years following.

Whether the public schools thus endowed by the United States were to be under national or state control remained a question, and the lands were held in reservation until after the admission of the state of Ohio in 1802. Congress, by act of March 3, 1803, made the state of Ohio its trustee for school lands, thus establishing a precedent which has since been followed.

In the act for the organization of Oregon territory (August 14, 1848), Senator Stephen A. Douglas inserted an additional grant for school purposes of the thirty-sixth section in each township, with indemnity for public land states thereafter to be admitted, making the reservation for school purposes the sixteenth and thirty-sixth sections, or 1,280 acres in each township of six miles square reserved in public land states and territories, and confirmed by grant in terms in the act of admission of each state or territory into the Union.

Dates of grants to states and territories for school purposes:

Ohio, March 3, 1803; Indiana, April 19, 1806; Illinois, April 18, 1818; Missouri, March 6, 1820; Alabama, March 2, 1819; Mississippi, March 3, 1803, May 19, 1852, March 3, 1857; Louisiana, April 21, 1806, February 15, 1843; Michigan, June 23, 1826; Arkansas, June 23, 1826; Florida, March 3, 1845; Iowa, March 3, 1845; Wisconsin, August 6, 1846; California, March 3, 1853; Minnesota, February 26, 1857; Oregon, February 14, 1859; Kansas, January 29, 1861; Nevada, March 21, 1864; Nebraska, March 19, 1864; Colorado, March 3, 1875. Territories — Washington, March 2, 1853; New Mexico, September 9, 1850, and July 22, 1854; Utah, September 9, 1850; Dakota, March 2, 1861; Montana, February 28, 1861; Arizona, May 26, 1864; Idaho, March 3, 1863; Wyoming, July 25, 1868.

Every sixteenth section of public land in states admitted prior to 1848, and every sixteenth and thirty-sixth section of such land in states and territories since organized, have been granted for the benefit of public or common schools. As soon as in running the lines of the public surveys the school sections "in place" (16 and 36) are fixed and determined, the appropriation thereof for the educational object is under the law complete, and lists are made out and patents issued to the states therefor. When sections 16 and 36 are found to be covered with prior adverse rights, such as legal occupancy and settlement by individuals under settlement laws prior to survey of the land, or deficient in area because of the fractional character of the townships, or from other causes, selections for indemnity are made.

§ 381. *Indemnity Selections.*—Selections from other public lands as indemnity for deficiencies in sections 16 and 36 and fractional townships, under the acts of May 30, 1826, and February 26, 1859, are made by agents appointed by the respective states, which selections are filed in the local offices of the district in which the land is situated, and if found to be correct, are certified to the general land office by the register of the local office where filed. If upon examination by the commissioner the same are found to inure to the state, a list is made out and certified to the secretary of the interior for his approval. When approved, a certified copy of the same is transmitted to the governor of the state in which the selections are made, and a copy thereof transmitted to the local office from which the selections are received, to be placed on file, and the approvals to be noted on its records.

Public Domain, p. 227.

For Public or Common Schools.—Every sixteenth section of public land in the states admitted prior to 1848, and every sixteenth and thirty-sixth section of such land in states and territories since organized, is granted for the benefit of public or common schools. Estimated at 67,893,919 acres.

§ 382. *For Seminaries or Universities.*—The quantity of two townships, or 46,080 acres, in each state or territory containing public land, and in some instances a greater quantity (Ohio, Florida, Wisconsin, and Minnesota), is granted or reserved for the support of seminaries or schools of a higher grade. Two townships are reserved in the territories of Washington, New Mexico, and Utah, which will be confirmed to them on their admission into the union.

Dates of grants and reservations for universities:

Ohio, April 21, 1792, and March 3, 1803; Indiana, March 26, 1804, and April 19, 1816; Illinois, March 26, 1804, and April 18, 1818; Missouri, February 17, 1818, and March 6, 1820; Alabama, April 20, 1818, and March 2, 1819; Mississippi, March 3, 1803, and February 20, 1819; Louisiana, April 21, 1806, March 3, 1811, and March 3, 1827; Michigan, June 23, 1836; Arkansas, June 23, 1836; Florida, March 3, 1854; Iowa, March 3, 1854; Wisconsin, December 15, 1854, and August 6, 1856; California, March 3, 1853; Minnesota, February 26, 1857, March 3, 1861, and July 8, 1870; Oregon, February 14, 1859, and March 2, 1861; Kansas, January 29, 1861; Nevada, July 4, 1866; Nebraska, April 19, 1864; Colorado, March 3, 1875; Washington Territory, July 17, 1854, and March 3, 1864; New Mexico, July 22, 1854; Utah, February 21, 1855.

§ 383. *For Agricultural and Mechanical Colleges.*—There was granted to all the states for agricultural and mechanical colleges, by act of July 2, 1862, and its supplements, 30,000 acres for each representative and senator in congress, to which the state was entitled under the apportionment of 1860, of land "in place" where the state contained a sufficient quantity of public land subject to sale at ordinary private entry at the rate of \$1.25 per acre; and of scrip representing an equal number of acres where the state did not contain such description of land, the scrip to be sold by the state, and located by its assignees on any such land in other states and territories, subject to certain restrictions.

Nineteen states have had the benefit of this act; and the two townships are reserved in the territories of Washington, New

Mexico, and Utah. These will be granted and confirmed to them upon their admission into the Union.

§ 384. *State Selections—Florida.*—The field-notes of survey can not be accepted as due proof of the swampy character of the lands for which indemnity is claimed under the act of March 2, 1855.

Copp's L. L., p. 1060.

Illinois.—Secretary Schurz holds, not only that the state of Illinois is not entitled to any of the swamp land within the six-mile limit of the grant to the Illinois Central Railroad Company, but also that the state is not entitled to indemnity therefor.

This decision was made upon the ground that the lands reserved by the president, under the act of September 20, 1850, did not pass to the state under the swamp-land act.

Copp's L. L., p. 1069.

All unappropriated lands which had been selected by the state as swamp were, by act of March 3, 1857, confirmed to the state.

Copp's L. L., p. 1068.

Indemnity selections for swamp lands must be confined to the respective states entitled thereto.

Copp's L. L., p. 1075.

Louisiana.—Where land is withdrawn under the provisions of section 10 of the act of March 3, 1811, on account of its being included within the limits of private land claim, and the land claim is afterwards rejected; held, that the swamp-land act took effect after the rejection of the private land claim and had relation back to the date of the grant.

Ham v. The State of Missouri, 18 How. 126; *Beecher v. Wetherby*, 5 Otto, 517; Copp's L. L., p. 1078.

Minnesota.—Where lands had been granted by congress in 1857 to the St. Paul etc. R. R. Co., and the state accepted the grant, she is estopped from claiming them again under the swamp-land act of 1860.

Minnesota and Oregon.—A homestead entry is not a claim recognized by the swamp-land act of March 12, 1860, granting lands to Minnesota and Oregon.

The failure of the officers of the interior department to perform the required act of segregation and listing of swamp-lands inuring to the state does not defeat or forfeit the claim of the state thereto.

Copp's L. L., p. 1081.

Oregon.—When notice of selection of a tract by a state has been received at the local land office, the state should be notified before proof and payment by a settler thereon is allowed.

Copp's L. L., p. 1086.

The grant of sections 16 and 36, swamp lands included, was made to Oregon by the acts of February 14, 1859, and September 12, 1860, and the school sections being granted in place, the right of indemnity does not exist.

Copp's L. L., p. 1088.

The grant made to the state of Oregon, though a grant *in presenti*, was not an unqualified grant of all the swamp lands in the state at that date. Any land which the government had reserved, sold, or disposed of was excepted from the operation of the grant.

Copp's L. L., p. 1091.

A failure on the part of the state to select within the time limited by the act does not defeat or forfeit the grant.

When a statute directs a person to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered directory to him, and not a limitation of his authority.

Cooley on Statutory Limitations, pp. 74-78; Copp's L. L., p. 1096.

§ 385. *Decision of Secretary Final as to Swamp Lands.*—The secretary of the interior is not only clothed with the power, but it is plainly his duty, to furnish the evidence of title to the state of all swamp lands, to which it is entitled, within its limits.

It is well settled that a state or its grantee may, in actions or suits involving the title to tracts claimed under the swamp-land grant, substitute parol proof for that which the law directs the secretary to furnish.

French v. Fyan, 3 Otto, 173.

And where the secretary decides the question of fact, whether a tract is swamp and overflowed or not, it ends all controversy as to that fact everywhere, in courts of equity as well as courts of law.

Marquis v. Frisbie, 101 U. S. 473.

The swamp-land act of 1850 created a reservation of swamp land.

R. R. Co. v. Fremont Co.; R. R. Co. v. Smith.

§ 386. In *Shepley v. Cowan*, 1 Otto, 336, the court said: "Whenever in the disposition of public lands any action is required to be taken by an officer of the land department, all

proceedings tending to defeat such action are impliedly inhibited. A sale is as much prohibited by a law of congress, when to allow it would defeat the object of that law, as though the inhibition were in direct terms declared."

And the patent when issued relates back, and gives title as of the date of the grant, and cuts off all intervening claims.

Shepley v. Cowan, 1 Otto, 337; *French v. Fyan*, 3 Id. 170.

And the right to a patent once vested is, in our system of the disposal of the public domain, so far as the government is concerned, equivalent to a patent issued.

Carroll v. Safford, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210; *Stark v. Starrs*, 6 Id. 418; *Barney v. Dolph*, 7 Otto, 652.

Arkansas.—The state of Arkansas can not properly present a second claim for the lands in question as swamp lands, having accepted them under a different grant and disposed of them under its provisions.

Copp's L. L., p. 1046.

§ 387. *State Selections in California*.—The swamp-land act of September, 1850, makes it the duty of the secretary of the interior to make out lists and plats of the land thereby granted, and to transmit them to the governors of the states. This provision is still in force. The acts of March 3, 1857, and July 23, 1866, merely confirmed to the respective states selections or sales previously made. The seventh section of the act of July 23, 1866, is not repealed by the revised statutes of the United States, notwithstanding it is not incorporated therein.

And in the case of the state of Oregon against the United States, it was held that the secretary of the interior is not only clothed with the power, but that it is plainly his duty, to furnish the evidence of title to the state to such lands within its limits, and that when the secretary decides the question of fact, whether a tract is swamp and overflowed or not, it ends all controversy as to that fact everywhere, in courts of equity as well as courts of law.

Marquis v. Frisbie, 101 U. S. 473; *Copp's L. L.*, p. 1097.

When a Mexican grant is of quantity within larger exterior boundaries, and the claimant has selected and had patented to him the quantity granted and confirmed, he will not be allowed to purchase under the seventh section of the act of July 23, 1866, any of the lands not selected within the exterior boundaries of the grant.

But where grants were made by specific boundaries, and the

claimant has occupied the lands (through some mistake or misapprehension) not included within such specific boundaries, he may purchase under the seventh section of said act the lands so occupied, which were excluded from the grant on final survey, if no claim thereto exist except that of the United States.

Copp's L. L., p. 1132.

§ 388. By the act of September 28, 1850, all swamp lands in California were granted *in præsentia* to that state. Such lands were not public lands on the third of March, 1853, when the pre-emption laws were extended to that state, and therefore could not be entered and sold under those laws.

The United States surveyor general for California will, in all cases where application is made by the state for the approval of segregation maps and surveys made by her, require satisfactory evidence that such survey was actually made in the field, the exact date of such survey, and by whom made; he is also required to transmit the evidence upon which he based his approval of township plats made by the state so that the commissioner may act intelligently.

Copp's L. L., p. 1049.

Secretary Schurz, in the case of Central Pacific R. R. Co. v. State of California, held, that all public land in California that was actually swampy inured to the state September 28, 1850, and a subsequent disposition thereof by the government, either by grant to a railroad or sale to individuals, could not divest the state's title. The act of July 23, 1866, confirms absolutely to the state *all lands not in a state of reservation* which had been segregated by her prior to that act, no matter what the character of the land might be, provided the surveys were made on the rectangular system, and provided further, that no valid settler's claim had attached to the land at that date.

Copp's L. L., p. 1052.

When a question is raised as to the correctness of the return of the surveyor general as to the character of certain land, a hearing should be ordered to ascertain the facts in the case.

Copp's L. L., p. 1057.

§ 388a. *Lakes—Navigable Waters United States.*—The case of the Tulare lake region of California involved a tract of land lying upon the borders of lake Tulare containing upwards of 100,000 acres of land. On the fourteenth day of February, 1882, the commissioner approved a survey of this land known as the

Creighton survey, which represented the whole of said tract as swamp lands. An appeal to the secretary was taken, both by the Southern Pacific Railroad Company and the attorney general of the United States in behalf of settlers.

The secretary, in his letter or decision of March 9, 1883, holds that the swamp-land grant is a grant *in præsentia*, except as to states admitted into the Union after the passage of the act.

French v. Fyan, 93 U. S. 169.

And that if the tract in question, at the time the swamp-land grant passed, was covered with water apparently of a permanent character, it would not pass to the state under the grant, although subsequently, by a rescission of the waters, land of a dry or swampy character should come into existence.

St. Clair v. Lovington, 23 Wall. 46; Wolf Lake, Illinois, 5 C. L. O. 19.

§ 389. *Lakes not Navigable*.—In relation to the lakes Kern and Buena Vista in California, held, that it was a question of fact, not disclosed by the record, whether these were navigable waters of the United States. That unless they were connected with interstate or foreign water communication and were navigable, they could not be classed as navigable waters of the United States, but of the state; and if not navigable, the state was the owner by virtue of the surrounding lands, which carried with them the title to the e bodies of water.

Copp's L. L., p. 1059.

Where state selections were made prior to the act of July 23, 1866, for land, the disposal of which had been suspended by the general government as being within a Mexican grant, such selections are invalid, and will not be recognized by the department.

Copp's L. L., p. 1117.

The survey of public lands becomes final and effective when the plat thereof is filed in the local office.

Copp's L. L., p. 1117.

Under the constitution and laws of California there is no distinction as to rights of property between aliens and citizens, and under the laws of the United States an alien may take and hold land of the government until office found.

Copp's L. L., p. 1126.

The act of 1866 does not, in the opinion of the attorney general of the United States, authorize indemnity for swamp lands.

Copp's L. L., p. 1138.

Section 1 of said act has no reference to swamp lands, but

merely confirms sales under selections made in part satisfaction of grants to the state of California, of which the swamp grant is not one. The fourth section of said act alone refers to swamp lands.

Copp's L. L., p. 1141.

The second section of the act of March 1, 1877, confirms to the state of California all indemnity school selections which had been certified to the state prior to its passage, except those lands occupied by *bona fide* settlers prior to certification, and excepting also the class named in the first proviso thereof, which are not confirmed, but simply subject to the right of purchase from the government by the innocent purchasers from the state.

Copp's L. L., p. 1150.

This act provided an exception to the confirmation of invalid state selections, and gave the department a new jurisdiction to adjudge the cases and complete the remedy as in case of the original disposal of the land.

Copp's L. L., p. 1150.

§ 390. *Improper Certification.*—The act of March 1, 1877, imposes upon the land department the duty of inquiring into alleged settlement rights upon lands improperly certified to the state of California in lieu of school sections 16 and 36.

Such being the case, the certification itself must be brought in review by the same tribunal.

The act, therefore, confers jurisdiction to dispose of the title to the party adjudged to have the better right under the provisions thereof.

Copp's L. L., p. 1157.

After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections 16 and 36 for school purposes, and the secretary of the interior had no authority to list such lands to the state on such selection.

United States v. Mullen, 7 Saw. 466.

Where such lands have been listed over to the state and patented to private individuals, a court of equity will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence or mistake, or errors of law. The bill should be filed by the United States, and signed by the attorney general of the United States.

United States v. Mullen, 7 Saw. 466; United States v. Throckmorton, 98 U. S. 61. As to selections of school, swamp, and other lands by the state of California, see *Watson v. State of California*, Copp's L. L., p. 1145; *White v. University of California*, Id. 1145; see also *School Sections in California*, Id. 1103.

§ 391. Under the act of July 23, 1866, to quiet land titles in California (14 Stat. 218), it became necessary that the governor should make application to the surveyor general, and that, by direction of the general land office, segregation surveys should be made "of all the swamp and overflowed lands in such townships, and to report the same to the general land office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he could obtain. The Creighton survey of Tulare lake was duly authorized, and was made in the field in January and February, 1880. The field-notes were returned to the surveyor general, and approved by him, and the tract returned and classified as swamp and overflowed lands; and the secretary affirmed the decision of the commissioner.

Copp's L. O., April 15, 1883.

§ 392. The act of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat. 244), is the first act under which rights in the public lands, as against the United States, could be originally acquired in that state. California, unlike the other public land states, refused or neglected to acquire title to any of the public land grants to states, or at least neglected to take any steps to have the lands thus granted listed over to her under general laws, until the passage of the act of July 23, 1866, entitled "An act to quiet land titles in California" (14 Stat. 218), under the provisions of which act all transfers have been and must be made, and therefore the entire act is given below.

§ 393. *Be it enacted by the Senate and House of Representatives of the United States of America*, That in all cases where the state of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said state by any act of congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are confirmed to said state; *provided*, that no selection made by said state contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Spanish or Mexican grant, or to any land which

at the time of the passage of this act was included within the limits of any city, town, or village, or within the county of San Francisco; *and provided further*, that the state of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.

§ 394. *And be it further enacted*, That where the selections named in section 1 of this act have been made upon land which has been surveyed by authority of the United States, it shall be the duty of the proper authorities of the state where the same has not already been done, to notify the register of the United States land office for the district in which the land is located of such selection, which notice shall be regarded as the date of the state selection, and the commissioner of the general land office shall, immediately after the passage of this act, instruct the several local registers to forward to the general land office, after investigation and decision, all such selections which, if found to be in accordance with section 1 of this act, the commissioner shall certify over to the state in the usual manner.

§ 395. *And be it further enacted*, That the selections named in section 1 of this act have been made from lands which have not been surveyed by authority of the United States, but which selections have been surveyed by authority of and under the laws of said state, and the land sold to purchasers in good faith under the laws of the state, such selections shall, from the date of the passage of this act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land; and if upon survey of such lands by the United States, the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the state survey and selection. Upon the filing with the register of the proper United States land office of the township plat in which any such selection of unsurveyed land is located, the holder of the state title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed to pre-emptors under existing laws; and if found in accordance with section 1 of this act, the land embraced therein shall be certified over to the state by the commissioner of the general land office.

§ 396. *And be it further enacted*, That in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it

shall be the duty of the commissioner of the general land office to certify over to the state of California as swamp and overflowed all the lands represented as such upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor general for the state of California, to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval; *provided*, that in segregating large bodies of land notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such state surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor general to make segregation surveys upon application to said surveyor general by the governor of said state, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said state shall claim as swamp and overflowed any land not represented as such upon the map, or in the returns of the surveyors, the character of such land at the date of the grant, September 28, 1850, and the right to the same, shall be determined by testimony to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land office.

§ 397. *And be it further enacted*, That it shall be the duty of the commissioner of the general land office to instruct the officers of the local land offices and the surveyor general, immediately after the passage of this act, to forward lists of all selections made by the state, referred to in section 1 of this act, and lists and maps of all swamp and overflowed lands claimed by the state, or surveyed as provided in this act, for final disposition and determination, which final disposition shall be made by the commissioner of the general land office without delay.

§ 398. *And be it further enacted*, That an act entitled "An act to provide for the survey of the public lands of California,

the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853, shall be construed as giving the state of California the right to select for school purposes other lands in lieu of the sixteenth and thirty-sixth sections, as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority or by private land claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines shall have been extended over such lands; and in case of Spanish or Mexican grants, when the final survey of such grants shall have been made. The surveyor general of the state of California shall furnish the state authorities with lists of all such sections so covered as a basis of selection, such selections to be made from surveyed lands and within the same land district as the section for which the selection is made.

§ 399. *And be it further enacted*, That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same, as according to the lines of their original purchase, and no valid adverse right or title (except of the United States) exists, such purchaser may purchase the same after having such land surveyed under existing laws, at the minimum price established by law upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries; *provided*, that the provisions of this section shall not be applicable to the city and county of San Francisco; *and provided*, that the right to purchase herein given shall not extend to lands containing mines of gold, silver, copper, or cinnabar; *provided*, that whenever it shall be made to appear by petition from the occupants of such land that injury to permanent improvements would result from running the lines of the public surveys through such permanent improvements, the commissioner of the general land office may recognize existing lines of subdivisions.

§ 400. *And be it further enacted*, That in all cases where a claim to land by virtue of a right or title derived through Spanish or Mexican authorities has been finally confirmed, and a

survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections 6 and 7 of the act of July 1, 1864, "to expedite the settlement of titles to land in the state of California," and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections, within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States; *provided*, that nothing in this act shall be construed so as in any manner to interfere with the rights of *bona fide* pre-emption claimants.

§ 401. *And be it further enacted*, That from the decrees of the district courts of the United States for the district of California, approving or correcting the surveys of private land claims under Spanish or Mexican grants, rendered after the first day of July, 1865, an appeal shall be allowed for the period of one year after the entry of such decrees, to the circuit court of the United States for California, as provided by section 3 of the act of July 1, 1864, "to expedite the settlements of titles to land in the state of California," and the decision of the circuit court shall be final; *provided, however*, that from decrees of the district courts as aforesaid, made after July 1, 1865, and prior to the passage of this act, an appeal may be taken to the United States circuit court for the state of California within one year from the approval of this act.

Approved, July 23, 1866.

CHAPTER XX.

GENERAL GRANTS TO STATES AND TERRITORIES.

- § 402. Grant to New States.
- § 403. Selections and Locations of Lands Granted in Last Section.
- § 404. Grant of Swamp and Overflowed Lands to Certain States to Aid in Construction of Levees, etc.
- § 405. Secretary of Interior to Make Lists of Such Lands for Transmission to the Governors of the States.
- § 406. Legal Subdivisions, Mostly Wet and Unfit for Cultivation.
- § 407. Indemnity to States where Lands have been Sold by United States.
- § 408. Patents to Issue for Swamp Lands to Purchasers and Locators Prior to Issuing of Patents to States, etc.
- § 409. Selections of Swamp and Overflowed Lands Confirmed.
- § 410. Swamp-land Grants to Oregon and Minnesota.
- § 411. Public Lands not Mineral Granted to Each State for Purpose of Establishing Agricultural Colleges.
- § 412. Agricultural College Scrip, to be Issued, when.
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- § 414. Proceeds of Sales, how Applied.
- § 415. Conditions of Grant, Assent of States. Diminution of Fund to be Made up by State. Annual Interest to be Applied Regularly. Funds to be Expended for Buildings. College to be Furnished or Moneys Refunded to United States. Annual Reports of Colleges. Computation when Double-minimum Lands are Selected. States in Rebellion not Entitled to Benefit of Grant. Assent of States to be Given Prior to July 1, 1874.
- § 416. Fees of Land Officers.
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among States of Union, how. To be Applied as Legislature may Direct.

- § 431. Net Proceeds of Sales of Public Lands Payable at the Treasury Half Yearly, to Whom.
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- § 433. Length of Continuation of this Grant.
- § 434. Not Less than \$150,000 to be Appropriated Annually for Surveys.
- § 435. Amount Due on State Stocks Held by United States in Trust, to be Withheld in Case of Default of Principal or Interest.

§ 402. *Grant to New States.*—There is granted for purposes of internal improvement, to each new State hereafter admitted into the Union, upon such admission, so much public land as, including the quantity that was granted to such state before its admission and while under a territorial government, will make 500,000 acres.

5 Stat. 455; R. S. 2378.

§ 403. *Selections and Locations of Lands Granted in Last Section.*—The selections of lands, granted in the preceding section, shall be made within the limits of each state so admitted into the Union, in such manner as the legislatures thereof, respectively, may direct; and such lands shall be located in parcels conformably to sectional divisions and subdivisions of not less than 320 acres in any one location, on any public land not reserved from sale by law of congress or by proclamation of the president. The locations may be made at any time after the public lands in any such new state have been surveyed according to law.

5 Stat. 455; R. S. 2379.

§ 404. *Grant of Swamp and Overflowed Lands to Certain States to Aid in Construction of Levees, etc.*—To enable the several states (but not including the states of Kansas, Nebraska, Nevada, and Colorado) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the twenty-eighth day of September, A. D. 1850, are granted and belong to the several states respectively, in which said lands are situated; *provided, however,* that said grant of swamp and overflowed lands, as to the states of California, Minnesota, and Oregon, is subject to the limitations, restrictions, and conditions hereinafter named and specified, as applicable to said three last-named states, respectively.

9 Stat. 520; 12 Id. 3; 18 Id. 16; R. S. 2479.

§ 405. *Secretary of the Interior to Make Lists of Such Lands*

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for Transmission to the Governors of the States.—It shall be the duty of the secretary of the interior to make accurate lists and plats of all such lands, and transmit the same to the governors of the several states in which such lands may lie, and at the request of the governor of any state in which said swamp and overflowed lands may be, to cause patents to be issued to said state therefor, conveying to said state the fee simple of said land. The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming said lands, by means of levees and drains.

9 Stat. 519; R. S. 2480.

§ 406. *Legal Subdivisions, Mostly Wet and Unfit for Cultivation.*—In making out lists and plats of the lands aforesaid, all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

9 Stat. 519; R. S. 2481.

§ 407. *Indemnity to States where Lands have been Sold by United States.*—Upon proof by the authorized agent of the state, before the commissioner of the general land office, that any of the lands purchased by any person from the United States, prior to March 3, 1857, were "swamp lands," within the true intent and meaning of the act entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850, the purchase money shall be paid over to the state wherein said land is situated; and when the lands have been located by warrant or scrip, the said state shall be authorized to locate a like quantity of any of the public lands subject to entry, at \$1.25 per acre, or less, and patents shall issue therefor. The decision of the commissioner of the general land office shall be first approved by the secretary of the interior.

10 Stat. 634, 635; 11 Id. 251; R. S. 2482.

§ 408. *Patents to Issue for Swamp Lands to Purchasers and Locators Prior to Issuing of Patents to States, etc.*—The president of the United States shall cause patents to be issued to the purchaser or purchasers, locator or locators, who made entries of the public lands claimed as swamp lands, either with cash or land warrants, or scrip, or under any homestead or pre-emption laws prior to the issue of patents to the state or states;

provided, that in all cases where any state, through its constituted authorities, may have sold or disposed of any tract or tracts of land prior to the entry, sale, or location of the same under the pre-emption or other laws of the United States, no patent shall be issued by the president for such tract or tracts of land, until such state, through its constituted authorities, shall release its claim thereto in such form as shall be prescribed by the secretary of the interior. In all cases where such state did not within ninety days from the second day of March, 1855, the date of an act entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," through its constituted authorities, return to the general land office of the United States a list of all the lands sold as aforesaid, together with the dates of such sales and the names of the purchasers, the president shall issue patents to persons who made such entries of the public lands so claimed as swamp land.

10 Stat. 634; R. S. 2483.

§ 409. *Selection of Swamp and Overflowed Lands Confirmed.*—All lands selected and reported to the general land office as swamp and overflowed land by the several states entitled to the provisions of said act of September 28, 1850, prior to March 3, A. D. 1857, are confirmed to said states respectively so far as the same remained vacant and unappropriated and not interfered with by an actual settlement under any law of the United States.

11 Stat. 251; R. S. 2484.

§ 410. *Swamp-land Grants to Oregon and Minnesota.*—The provisions of the act of congress entitled "An act to enable the state of Arkansas and other states to redeem" the swamp lands within their limits, approved September 28, A. D. 1850, extend to the states of Minnesota and Oregon; *provided*, that the grant shall not include any lands which the government of the United States may have sold or disposed of under any law enacted prior to March 12, 1860, prior to the confirmation of title to be made under the authority of said act—and the selections to be made from lands already surveyed in each of the states last named, under the authority of the act aforesaid, shall have been made within two years from the adjournment of the legislature of each state, at its next session after the twelfth day of March, A. D. 1860—and as to all lands surveyed, or to be surveyed, thereafter, within two years from such adjournment, at the next session after notice by the secretary

of the interior to the governor of the state that the surveys have been completed and confirmed.

12 Stat. 3; R. S. 2490.

§ 411. *Public Lands, not Mineral, Granted to each State for Purposes of Establishing Agricultural Colleges.*—There is granted to the several states, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each state a quantity equal to 30,000 acres for each senator and representative in congress to which the states are respectively entitled by the apportionment under the census of 1860; *provided*, that no mineral lands shall be selected or purchased under the provisions of this grant.

12 Stat. 503.

§ 412. *Agricultural College Scrip to be Issued where there is No Sufficient Offered Land in Any State to Satisfy the Grant.*—The land aforesaid, after being surveyed, shall be apportioned to the several states in sections or subdivisions of sections, not less than one quarter of a section; and whenever there are public lands in a state subject to sale at private entry at \$1.25 per acre, the quantity to which said state shall be entitled shall be selected from the lands within the limits of such state, and the secretary of the interior is hereby directed to issue to each of the states in which there is not the quantity of public lands subject to sale at private entry at \$1.25 per acre, to which said state may be entitled under the provisions of this grant, land scrip to the amount in acres for the deficiency of its distributive share: said scrip to be sold by said states and the proceeds thereof applied to the uses and purposes prescribed by this grant, and for no other use or purpose whatsoever; *provided*, that in no case shall any state to which land scrip may thus be issued be allowed to locate the same within the limits of any other state, or of any territory of the United States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at \$1.25, or less, per acre, or shall be received from actual settlers in payment of pre-emption claims in the same manner and to the same extent as is now authorized by law in case of military bounty land warrants; *provided further*, that not more than 1,000,000 acres shall be located by such assignees in any one of the states, and not more than three sections of land in any one township shall be entered with said

scrip, and no location made prior to July 2, 1863, shall be valid.

12 Stat. 504; 15 Id. 227; 16 Id. 186; R. S. 2278.

§ 413. *Expenses of Management, etc., to be Paid by States.*—All the expenses of management, superintendence, and taxes from date of selection of said lands, previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the states to which they may belong, out of the treasury of said states, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned.

12 Stat. 504.

§ 414. *Moneys from Sale of Land and Scrip to be Invested and Interest Applied to Support of College of Agriculture and the Mechanical Arts.*—All moneys derived from the sale of the lands aforesaid by the states to which the lands are apportioned, and from the sales of land scrip, shall be invested in stocks of the United States, or of the states, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, except as herein provided, and the interest of which shall be inviolably appropriated, by each state, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.*

12 Stat. 504.

§ 415. *Conditions of Grant; Assent of States.*—The grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts:

1. If any portion of the fund invested, as provided by the preceding section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be

* Amended March 3, 1883. See § 436.

replaced by the state to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in this grant, except that a sum, not exceeding ten per centum upon the amount received by any state, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said states.

12 Stat. 504.

2. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings.

12 Stat. 504.

3. Any state claiming the benefit of the provisions of this grant shall provide, on or before July 1, 1874, not less than one college, or the grant to such state shall cease; and said state shall be bound to pay the United States the amount received of any lands previously sold, and the title to purchasers under the state shall be valid.

12 Stat. 504; 13 Id. 47; 14 Id. 208; 17 Id. 416, 417.

4. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other matters, including state industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail free, by each, to all the other colleges which may be endowed by this grant, and one copy to the secretary of the interior.

12 Stat. 505.

5. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the states at the maximum price, and the number of acres proportionally diminished.

12 Stat. 505.

6. No state while in a condition of rebellion or insurrection against the government of the United States shall be entitled to the benefit of this grant.

12 Stat. 505.

7. No state shall be entitled to the benefits of this grant unless it shall have expressed its acceptance thereof by its legislature on or before July 1, 1874.

12 Stat. 505; 13 Id. 47; 14 Id. 208; 17 Id. 416, 417.

§ 416. *Fees of Land Officers.*—The land officers shall receive the same fees for locating agricultural college scrip as are now allowed for the location of military bounty land warrants under existing laws; *provided*, their maximum compensation shall not be thereby increased.

12 Stat. 505.

§ 417. *Governors of States to Report Annually to Congress.*—The governors of the several states to which scrip shall be issued under this grant shall be required to report annually to congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same, and what appropriation has been made of the proceeds.

12 Stat. 505.

§ 418. *New States Entitled to Benefits of Grant.*—When any territory shall become a state and be admitted into the Union, such new state shall be entitled to the benefits of this grant, by expressing the acceptance therein required within three years from the date of its admission into the Union, and providing the college or colleges within five years after such acceptance.

14 Stat. 208, 209; Cir. G. L. O., May 4, 1863 (Zab. L. L. 445).

§ 419. *Nevada may Select Double-minimum Lands not Mineral.* The state of Nevada is authorized to select the alternate even-numbered sections within the limits of any railroad grant in said state, in satisfaction of her grant of lands under the act of July 2, 1862, and acts amendatory thereof, but this privilege shall not extend to lands upon which there may be any right-ful claims under the pre-emption and homestead laws; and if lands be selected, the minimum price of which is \$2.50 per acre, each acre so selected shall be taken by the state in satisfaction of two acres, the minimum price of which is \$1.25 per acre; but lands valuable for mines of gold, silver, quicksilver, or copper shall not be selected in satisfaction of this grant.

12 Stat. 503, 504, 505; 15 Id. 67, 68.

§ 420. *Selection of Lands Granted to California.*—The lands granted to the state of California for the establishment of an agricultural college by the act of July 2, 1862, and acts amendatory thereto, may be selected by said state from any lands within said state subject to pre-emption, settlement, entry, sale, or location, under any laws of the United States. Such selection may be made in any legal subdivisions, adjoining by sides, so as to constitute bodies of not less than 160 acres; or they may be made in separate subdivisions of 40, 80, or 120 acres, respect-

ively; *provided*, that this privilege shall not extend to lands upon which there may be rightful claims under the pre-emption and homestead laws, nor to mineral lands; *provided further*, that if lands be selected as aforesaid, the minimum price of which is \$2.50 per acre, they shall be taken acre for acre in part satisfaction of the grant, and the state of California shall pay to the United States the sum of \$1.25 per acre for each acre so selected, when the same shall be patented to the state by the United States; *provided further*, that where lands sought to be selected for the agricultural college are unsurveyed, the proper authorities of the state shall file a statement to that effect with the register of the United States land office, describing the land by township and range, and shall make application to the United States surveyor general for a survey of the same, the expenses of the survey for field work to be paid by the state, provided there be no appropriation by congress for that purpose. The United States surveyor general, as soon as practicable, shall have the said lands surveyed and the township plats returned to the United States land office, and lands so surveyed and returned shall, for thirty days after the filing of the plats in the United States land office, be held exclusively for location for the agricultural college, and within said 30 days the proper authorities of the state shall make application to the United States land office for the lands sought to be located by sections and parts of sections; *provided*, that any rights under the pre-emption or homestead laws, acquired prior to the filing of the required statement with the register, shall not be impaired or affected by this act; *provided further*, that such selections shall be made in every other respect subject to the conditions, restrictions, and limitations contained in the acts hereby modified.

12 Stat. 503, 504, 505; 15 Id. 67, 68; 16 Id. 581.

§ 421. *Lands Granted to Oregon for an Agricultural College, Selections of.*—The lands granted to the state of Oregon for the establishment of an agricultural college by act of July 2, 1862, and acts amendatory thereto, may be selected by said state from any lands within said state subject to homestead or pre-emption entry under the laws of the United States; and in any case where land is selected by the state, the price of which is fixed by law at the double-minimum of \$2.50 per acre, such land shall be counted as double the quantity toward satisfying the grant.

12 Stat. 503, 504, 505; 17 Id. 217, 218.

§ 422. *Selections Confirmed Except when Legally Appropriated.* Any such selections made by said state prior to June 4, 1872, are confirmed, except so far as they may conflict with any adverse legal right existing on that date; *provided*, that the state shall not receive more than 90,000 acres, the quantity granted by the act of July 2, 1862; *provided also*, that such lands shall not be sold by said state, for less than \$2.50 per acre; and where settlement is made upon the same, preference in all cases shall be given to actual settlers at the price for which said lands may be offered.

12 Stat. 503, 504, 505; 17 Id. 217, 218.

§ 423. *Locations in Excess of Quantity Allowed Confirmed.*—All locations of agricultural college scrip made within thirty days after the date of the approval of the act of July 27, 1868, if otherwise in conformity with law, are hereby legalized and made valid.

16 Stat. 186.

[NOTE.—This act was designed to cure selections in excess of three sections to a township, which had been made by parties in ignorance of the limitation contained in the act of July 27, 1868; 15 Stat. 227.]

§ 424.—*Certain Excess Locations in Wisconsin Confirmed.*—All locations of agricultural college scrip allowed prior to December 1, 1867, at the several land offices in the state of Wisconsin, in excess of the maximum quantity authorized by the act of July 2, 1862, are hereby legalized; and the commissioner of the general land office is authorized to issue patents upon such locations; *provided*, the same shall be in all other respects legal and valid.

16 Stat. 116.

§ 425. *Reissue of Agricultural College Scrip.*—The provisions of the act of congress of June 23, 1860, relating to the reissue of land warrants in certain cases, are hereby extended so as to include the reissue of agricultural college land scrip, lost, canceled, or destroyed without the fault of the owner thereof, under such rules and regulations as the secretary of the interior may prescribe.

12 Stat. 90, 91; 18 Id. 111. Cir. G. L. O., Aug. 20, 1875 (Copp's L. L. 486; 1 Copp's L. O. 108).

§ 426. *Settlements before Survey on Sections 16 or 36; Deficiencies thereof.*—Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the pre-emption claim of such

settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

11 Stat. 385; 18 Id. 202; R. S. 2275.

§ 427. *Selections to Supply Deficiencies of School Lands.*—The lands appropriated by the preceding section shall be selected within the same land district, in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one half and not more than three quarters of a township, three quarters of a section; for a fractional township containing a greater quantity of land than one quarter and not more than one half of a township, one half-section; and for a fractional township containing a greater quantity of land than one entire section and not more than one quarter of a township, one quarter-section of land.

4 Stat. 179; 11 Id. 385; 18 Id. 202; R. S. 2276.

§ 428. *Fee Simple to Pass in All Grants of Land to States and Territories.*—Where lands have been or may hereafter be granted by any law of congress to any one of the several states and territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the commissioner of the general land office, under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

10 Stat. 346; 18 Id. 475; R. S. 2449; *Shepley v. Cowan*, 52 Mo. 559.

§ 429. *Certain States to be Paid Ten per Cent. on Net Proceeds of Sales of Public Lands therein, etc.*—From and after the thirty-first day of December, in the year of our Lord 1841, there shall be allowed and paid to each of the states of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan, over and above what each of the said states is entitled to by the terms of the compacts entered into between them and the United States, upon their admission into the Union, the sum of ten per centum upon the net proceeds of the sales of the public lands, which, subsequent to the day aforesaid, shall be made within the limits of each of said states respectively; *provided*, that the sum so allowed to the said states, respectively, shall be in no wise affected or diminished on account of any sums which have been heretofore, or shall be hereafter, applied to the construction or continuance of the Cumberland road, but that the disbursements for the said road shall remain, as heretofore, chargeable on the two per centum fund provided for by compacts with several of the said states.

5 Stat. 453.

§ 430. *After Deducting Said Ten per Cent., etc., Residue to be Divided among the States, etc., of the Union, how.*—After deducting the said ten per centum, and what, by the compacts aforesaid, has heretofore been allowed to the states aforesaid, the residue of the net proceeds, which net proceeds shall be ascertained by deducting from the gross proceeds all the expenditures of the year for the following objects: Salaries and expenses on account of the general land office; expenses for surveying public lands; salaries and expenses in the surveyor-general's offices; salaries, commissions, and allowances to the registers and receivers; the five per centum to new states of all the public lands of the United States, wherever situated, which shall be sold subsequent to the said thirty-first day of December, shall be divided among the twenty-six states of the Union and the District of Columbia, and the territories of Wisconsin, Iowa, and Florida, according to their respective federal representative population as ascertained by the last census, to be applied by the legislatures of the said states to such purposes as the said legislatures may direct; *provided*, that the distributive share to which the District of Columbia shall be entitled shall be applied to free schools or education in some other form, as congress may direct; *and provided also*, that nothing herein contained shall be construed to the prejudice of future applications for a reduction of the price of the public lands, or to the prejudice of appli-

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cations for a transfer of the public lands, on reasonable terms, to the states within which they lie, or to make such future disposition of the public lands, or any part thereof, as congress may deem expedient.

5 Stat. 453.

§ 431. *Net Proceeds of Sales of Public Lands, Payable at the Treasury Half-yearly, to Whom.*—The several sums of money received in the treasury as the net proceeds of the sales of the public lands shall be paid at the treasury half-yearly, on the first day of January and July in each year, during the operation of this act, to such person or persons as the respective legislatures of the said states and territories, or the governors thereof, in case the legislatures shall have made no such appointment, shall authorize and direct to receive the same.

5 Stat. 454.

§ 432. *Money Due and Payable by This Act to be First Applied to Payments of Debts Due United States.*—Any sum of money which at any time may become due and payable to any state of the Union, or to the District of Columbia, by virtue of this act, as the portion of the said state or district of the proceeds of the sales of the public lands, shall be first applied to the payment of any debt due and payable from the said state or district to the United States; *provided*, that this shall not be construed to extend to the sums deposited with states under the act of Congress of twenty-third June, eighteen hundred and thirty-six, entitled "An act to regulate the deposits of the public money," nor to any sums apparently due to the United States as balances of debts growing out of the transactions of the revolutionary war.

5 Stat. 454.

§ 433. *Length of Continuation of This Grant.*—This act shall continue and be in force until otherwise provided by law, unless the United States shall become involved in war with any foreign power, in which event, from the commencement of hostilities, the four preceding sections of this act shall be suspended during the continuance of such war; *provided, nevertheless*, that if prior to the expiration of this act, any new state or states shall be admitted into the Union, there be assigned to such new state or states the proportion of the proceeds accruing after their admission into the Union, to which such state or states may be entitled, upon the principles of this act, together with

what such state or states may be entitled to by virtue of compacts to be made on their admission into the Union.

5 Stat. 454.

§ 434. *Not Less than One Hundred and Fifty Thousand Dollars to be Appropriated Annually for Surveys.*—There shall be annually appropriated for completing the surveys of said lands, a sum not less than one hundred and fifty thousand dollars; and the minimum price at which the public lands are now sold at private sale shall not be increased, unless congress shall think proper to grant alternate sections along the line of any canal or other internal improvement, and at the same time to increase the minimum price of the sections reserved; and in case the same shall be increased by law, except as aforesaid, at any time during the operation of this act, then so much of this act as provides that the net proceeds of the sales of the public lands shall be distributed among the several states shall, from and after the increase of the minimum price thereof, cease and become utterly null and of no effect, anything in this act to the contrary notwithstanding; *provided*, that if, at any time during the existence of this act, there shall be an imposition of duties on imports inconsistent with the provisions of the act of March 2, 1833, entitled "An act to modify the act of the fourteenth of July, 1832, and all other acts imposing duties on imports," and beyond the rate of duty fixed by that act, to wit, twenty per cent. on the value of such imports, or any of them, then the distribution provided in this act shall be suspended, and shall so continue until this cause of its suspension shall be removed, and when removed, if not prevented by other provisions of this act, such distribution shall be resumed.

5 Stat. 454.

§ 435. *Amount Due on State Stocks Held by United States in Trust, to be Withheld from States in Case of Default of Principal or Interest.*—Whenever any state shall have been or may be in default for the payment of interest or principal on investments in its stocks or bonds, held by the United States in trust, it shall be the duty of the secretary of the treasury to retain the whole, or so much thereof as may be necessary, of the percentage to which such state may be entitled of the proceeds of the sales of the public lands within its limits, and apply the same to the payment of said interest or principal, or to the reimbursement of any sums of money expended by the United States for that purpose.

5 Stat. 801.

§ 436. All moneys derived from the sale of lands for the benefit of agriculture and the mechanic arts, under the act of July 2, 1862, and for the sale of land scrip by the states to which such lands are apportioned, shall be invested in stock of the United States, or of the states, or some other safe stocks; or the same may be invested by the states having no state stocks in any other manner, after the legislatures of such states have assented thereto, and engaged that such fund shall yield not less than five per centum upon the amount so invested, and that the principal thereof shall forever remain unimpaired; *provided*, that the moneys so invested shall constitute a perpetual fund, the capital of which shall forever remain undiminished (except so far as provided in section 5 of said act), and the interest of which shall be inviolably appropriated by each state which may take and claim the benefit of said act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.

CHAPTER XXI.

WATER RIGHTS.

- § 437. Water is a Part of the Soil.
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- § 454. Prescription to Flood Land.
- § 455. Injuries from Floods.
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- § 457. Conveyances.

§ 437. *Inseparably Annexed to the Soil.*—The government of the United States has a perfect title to the public land, and an absolute and unqualified right of disposal; and a running stream of water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it, as an incident to the soil, passes to the patentee of the land. A riparian proprietor may lawfully divert the water of a stream, for the purpose of irrigating his land, to a reasonable extent. But in no case may he do this so as to destroy or render useless or materially affect the application of the water by other riparian proprietors. Every proprietor of land through which a stream of water naturally flows may make a reasonable use of the water for any useful purpose.

Union M. & M. Co. v. Ferres et als., 2 Saw. 176.

The right to running waters on the public lands for purposes of irrigation may be acquired by prior appropriation as against parties not holding the fee-simple title.

Basey v. Gallagher, 20 Wall. 670.

§ 438. *Appropriation.*—The common-law doctrine in relation to riparian rights has very little if any application in the mineral regions of the United States; prior appropriation in these regions giving the better right to running waters. What will constitute an invasion of the rights of the first appropriator depends upon circumstances and whether the same is irremediable in its nature, whether the parties are able to respond in damages, etc.

Atchison v. Peterson, 20 Wall. 507.

§ 439. *Beds of Rivers—Riparian Rights.*—The rule of the common law that only those rivers are considered navigable where the tides ebb and flow is not applicable to this country, because many rivers in the United States are navigable for hundreds of miles above the highest point where the tide ebbs and flows.

Cates v. Wadlington, 10 Am. Dec. 699; *People v. Canal Appraisers*, 33 N. Y. 461.

There has been much controversy over this subject, and a list of the authorities on each side is given in a note at the end of the opinion in the case of *Arnold v. Mundy*, 10 Am. Dec. 385. The question is elaborately discussed in the case of *Barney v. Keokuk*, 92 U. S. 324, in which the court evidently indorses the rule above expressed, and this case would seem also to indicate that the court will hold when called upon that the beds of navigable rivers above tide-water as well as below belong to the state in which they lie, and that the title of riparian proprietors extends only to ordinary high-water mark.

§ 440. *Standing Water—Flowing Water.*—In a recent case in England it was decided that "water flowing in a well-established chaunel is not the subject of property. It is the subject only of usufruct. Standing water, on the other hand, is the subject of property. Therefore, he who sinks a well or a shaft or a pit on his own land is entitled to collect into that pit from all pores of the land, and from the small runlets and channels with which the soil is interspersed, such water as will naturally flow to that pit. That water he may make his own; it is immaterial whence it flows. A person who is injured by the sinking of the pit, though he can show that injury has resulted to him, has no right of action against the person who sunk the pit. The water which before ran in unknown channels has now been collected into an ascertained reservoir or receptacle, and has become the property of him who so collected it. By making it his property, the person who sinks the pit takes with

it, and incurs all the liability which attaches to that property, and he can not, after having so appropriated the water, cast it upon his neighbor and excuse himself by saying, "It would have flowed to you if I had not appropriated it."

West Cumberland Iron and Steel Co. v. Kenyon, L. R., 6 Ch. Div., 773.

This case was afterwards reversed on appeal, on the following grounds:

1. A party has a right to use his own land in the natural way, and taking out mineral is a natural use of mining property, and no adjoining proprietor can complain of the result of careful and proper mining operations.

2. That the defendant never intended to and never did store the water so as to appropriate it.

3. That no damage resulted to plaintiff, because the water found its way to plaintiff's land in the same course, in exactly the same place, in the same way, and to exactly the same extent that it did before the alleged injury.

Three separate concurring opinions were rendered by Lords Justices Brett, James, and Cotton, and the judgment of reversal seems to have been based almost entirely upon the ground that the facts did not show that the defendant ever stored the water so as to appropriate it, and upon the third ground above mentioned.

West Cumberland Iron and Steel Co. v. Kenyon, L. R., 11 Ch. Div. 782; see sec. 451.

§ 441. *Characteristics as Real Estate.*—The right to water must be treated in this state as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personalty.

Hill v. Newman, 5 Cal. 445.

From the policy of our laws, it has been held in this state to exist, without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation and use of the water.

Hill v. Newman, 5 Cal. 445.

Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.

Hill v. Newman, 5 Cal. 445.

Natural Wants.—Possession of public land gives the right to the use of water flowing through it for natural wants, but does

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not confer the right to divert it, and prevent its running upon the adjoining land of another, who has taken the same up subsequently, but before the attempt to change the course of the water.

Crandall v. Woods, 8 Cal. 136.

§ 442. *Against Mining Claim.*—Those who locate a mining claim and those who appropriate water have an equal equity, and their rights must be decided by priority.

Irwin v. Phillips, 5 Cal. 140; B. & W. L. C. 727.

Valuable Stream Struck in Mining.—If a mining corporation, in the rightful prosecution of its business of mining, discloses a flow of water which may be put to valuable uses, it may lawfully appropriate the same, or in any event, may maintain its claim to it against a mere trespasser.

Cole M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

The common-law doctrine, that water must flow in its natural channel, can not be applied in the case of the public mineral lands of California.

Irwin v. Phillips, 5 Cal. 140; B. & W. L. C. 727.

Necessities of Pacific Slope.—The necessity and peculiar uses of water in California and Nevada recognized by the court.

Cole M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

Peculiar Conditions.—The reasons which constitute the groundwork of the rules of the common law touching water rights have not lost their governing force in the mineral regions of the state. The conditions to which we are called upon to apply those rules are changed, rather than the rules themselves.

Hill v. Smith, 27 Cal. 476.

§ 443. *Water Rights, how Acquired and Held.*—The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.

Yankee Jim's U. W. Co. v. Crary, 25 Cal. 504.

The Right to Use—Appropriation.—Running water, so long as

it continues to flow in its natural course, is not the subject of private ownership; but a right may be acquired to its use which will be regarded and protected as property.

Kidd v. Laird, 15 Cal. 163.

Priority of Appropriation.—As between two locators of public land, the rule, *Qui prior est in tempore, potior est in jure*, must always apply.

Crandall v. Woods, 8 Cal. 136.

Test of Priority of Claim.—Possession or actual appropriation must be the test of priority in all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows.

Kelly v. Natoma Water Co., 6 Cal. 106; Kimball v. Gearhart, 12 Id. 28.

§ 444. *Appropriation.*—Water may be appropriated for the use of different pursuits and employed at alternate periods by the different appropriators.

Smith v. O'Hara, 43 Cal. 371.

Special Appropriation.—The taking up of the waters of a stream for a special limited purpose is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation.

McKinney v. Smith, 21 Cal. 374.

Surplus after First Appropriation.—Plaintiffs constructed a dam across Clear creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam, and facilitate the working of a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, through which they diverted the waters of the stream for general mining purposes. Still later, plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at these latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiffs' ditch had been extended: *held*, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that

as to the surplus above what was required for that particular purpose, defendants' right was paramount, and that plaintiffs could not recover.

McKinney v. Smith, 21 Cal. 374.

Waste Water.—If two persons, one prior in point of time to the other, appropriate water from the same stream by means of ditches, and a third person turns water into the stream from his ditch, starting from another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris*, and belongs to the person who appropriated the stream, according to priority of right.

Davis v. Gale, 32 Cal. 28.

§ 445. *Subsequent Locations Above and Below.*—The right of the first appropriator of water is protected from damage occasioned by subsequent locators above as well as below him.

Hill v. King, 8 Cal. 336.

Rights of Second Appropriator.—The subsequent appropriator of water, who acquires the privilege of using the waste water of the prior appropriator, can be deprived of the same at any time, unless the water has been returned into the original channel without any intention of recaption.

Woolman v. Garringer, 1 Mont. 535.

Purpose of Appropriation.—In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, Has the use and enjoyment of the water for the purpose for which the first appropriator claims it been impaired by the acts of the subsequent claimant?

Hill v. Smith, 27 Cal. 476.

Draining Ditch.—Where a ditch was cut by the grantors of plaintiff for the mere purpose of drainage, and with no *bona fide* intention of appropriating the water thus diverted to some useful object, and the ditches of defendant were built for the express purpose of appropriating such water: *held*, that the grantors of plaintiff had made no appropriation and had no priority.

Maeris v. Bicknell, 7 Cal. 261.

Change of First Appropriation.—If H., a miner, appropriated the water of a creek at a certain point, in 1865, and C. appropriated the same water above H. in 1867, for the use of a mill, and returned the water into the creek, so that H. had the benefit thereof, H. has no right to change his point of diversion of

the water in 1869, and appropriate it above C.'s mill and thereby deprive C. of the use of the water.

Columbia M. Co. v. Holter, 1 Mont. 296.

Surplus—Subsequent Appropriators.—Subsequent locators may appropriate the surplus waters of a stream left after a prior appropriation, and when the rights of such subsequent appropriators once attach, the prior appropriator can not encroach upon them by extending his appropriation; nor can he enlarge his ditch or dam so as to retain what he originally appropriated, if through intervening accidents (as the filling of the stream-bed with tailings) such enlargement would interfere with such intervening rights.

Nevada Water Co. v. Powell, 34 Cal. 109.

In such a case, when a right has once vested in the subsequent appropriator, the prior appropriator would be no more justified in extending his claim, or changing the means of appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first.

Nevada Water Co. v. Powell, 34 Cal. 109.

§ 446. *Appropriation by Tin-bounders.*—A mine had from before the time of living memory been worked by tin-bounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had from before the time of living memory used for the purpose of their works the water of an artificial watercourse, arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners, to restrain the diversion of the watercourse by the owner of the land in which it rose, was dismissed by the vice-chancellor, on the ground that there was no privity of estate between the owners and the bounders, and that the owners, therefore, could not claim an easement by prescription, on the ground of their enjoyment of it: *held*, on appeal, that an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine, as well as with the bounders.

Ivimey v. Stocker, L. R., 1 Ch. App. 396.

Intervening Appropriation.—If one who has appropriated a part

of the water of a stream, to propel machinery at a point on the same, makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale.

McDonald v. Askew, 29 Cal. 200.

§ 447. *Placers—Reasonable Use of Water.*—The reasonableness of the use of the water in placer mining is a question of fact for the jury.

Esmond v. Chew, 15 Cal. 137.

The test of a reasonable use is whether the use works damage to the common right; and, as applied in this case, is whether the defendant has, after allowing him unlimited use for domestic and culinary purposes, so used the water as to cause "actual, material, and substantial injury to the plaintiff," in the operation of his mill for reducing ores.

Union M. Co. v. Daugberg, 2 Saw. 450.

Use of Drain Water by Strangers.—No presumption of grant can arise against the mine owners from the continued use of an artificial stream of water obtained by drainage from mines.

Arkwright v. Gell, 5 Mees. & W. 203; B. & W. L. C. 816.

Such a stream may be rightfully cut off by a lower drain, draining the mine at a greater depth, although the water had been used for manufacturing purposes for many years, and had been granted by the owner of the surface to the parties so utilizing it.

Arkwright v. Gell, 5 Mees. & W. 203; B. & W. L. C. 816.

The interest in water acquired by one who locates on the bank of a stream, and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location and to the flow of the water in its natural course above.

McDonald v. Askew, 29 Cal. 200.

The Right to Use.—In Pennsylvania a proprietor of land over which a stream of water runs has, as against a lower proprietor, the use of only so much of the stream as will not materially diminish its quantity nor corrupt its quality. His right is not to be measured by the necessities of his business (operating lead mines).

Wheatley v. Chrisman, 24 Pa. St. 298.

Change of Rise.—A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch, for a special use, may afterwards change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made.

Davis v. Gale, 32 Cal. 26.

The transfer of the use of water from one locality to another does not forfeit the right.

Maeris v. Bicknell, 7 Cal. 261.

Use and Return.—If A. is the owner of a ditch and of the right to divert and use the waters of a stream in the same, and B. diverts the waters of a stream at a point above A.'s ditch and uses them in mining, but turns them back into A.'s ditch at another point before A. has use for them, without material diminution in quantity or quality, A. has no cause of action against B.

Yankee Jim's U. W. Co. v. Crary, 25 Cal. 504.

Deterioration.—As to the deterioration in the quality of the water by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*.

Bear River Co. v. N. Y. M. Co., 8 Cal. 327.

Any other rule would involve an absolute prohibition of the use of all the water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom.

Bear River Co. v. N. Y. M. Co., 8 Cal. 327.

Expiration of Use.—Where the use for which water was appropriated has ceased, the original appropriator has the right to hold it for sale.

Fabian v. Collins, 2 Mont. 510.

Use for Colliery Purposes.—An allegation that the plaintiff was possessed of mines, lands, and premises, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the said land and premises, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes.

Insole v. James, H. & N. 243.

§ 448. *Adverse Use*.—If a lower riparian proprietor had, by reason of an adverse use by a proprietor above, presumptively granted the use of the water to such upper proprietor, such presumed grant affects only the land held by the lower proprietor at the time of the supposed origin of the grant; and he may afterwards purchase lands on the same stream, and will hold them unaffected by such presumed grant.

Union M. Co. v. Ferris, 2 Saw. 176.

The use of water does not become adverse until it amounts to an actionable invasion of another right.

Union M. Co. v. Ferris, 2 Saw. 176.

Use for Twenty-one Years.—Where the lower proprietor had a right by deed from the then upper proprietor to erect a dam on the land of the latter for the diversion of water for watering his meadows, but had actually used the water so diverted (by means of a ditch from the dam) for above twenty-five years, in watering his stock: *held*, that such use for over twenty-one years entitled him to it, and that he might maintain suit against one claiming under the former upper proprietor for polluting the stream so as to render it unfit for his cattle.

Wheatley v. Chrisman, 24 Pa. St. 298.

Water Drained from Mine Used by Brewery.—In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones; and a title may be gained by twenty years' user as well to the former as to the latter. Therefore, where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it in brewing: *held*, as against strangers to the title of the makers of the adit, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it.

Magor v. Chadwick, 11 Ad. & El. 571.

Quære: Whether a universal practice in the neighborhood to resume the use of such adit waters for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters.

Magor v. Chadwick, 11 Ad. & El. 571.

Precipitating Pits—User.—A claim by the owner of a copper mine, who has used to sink pits on his own land, to fill such pits with iron, to cover the same with water, pumped from the mine for the purpose of precipitating the copper contained in such water, and afterwards to let off such water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse within 2 and 3 Wm. IV., c. 71, sec 2.

Wright v. Williams, 1 Mee. & W. 77; S. C., 1 Gale, 410; S. C., 1 Tyrw. & G. 375.

In plea of forty years' user under that statute, it is sufficient to allege the user to have been before the commencement of the suit; it is not necessary to allege it to have been before the act complained of.

Wright v. Williams, 1 Mee. & W. 77; S. C., 1 Gale, 410; S. C., 1 Tyrw. & G. 375.

§ 449. *Dams.*—The right to use water necessarily implies a right to dam and detain it.

Oregon Iron Co. v. Trullenger, 3 Or. 1.

Abatement of Dam.—Where a party attempts to construct a dam on a creek for the purpose of diverting the water at that point, and such diversion is illegal as against another party who has a dam lower down, the latter may oust the former the possession of the ground at that point and prevent the construction of the dam.

Butte T. M. Co. v. Morgan, 19 Cal. 609.

The plaintiffs by parol license from L., and from the defendant, constructed a watercourse, and thereby discharged the water from their own mines across the land of L., and thence across the land of the defendant. The defendant having revoked his license upon the plaintiff's refusal to discontinue using the watercourse, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. The defendant by stopping the watercourse on his own land would have done less damage to the plaintiffs than was actually done, but more damage to L., and possibly some damage to the public: *held*, affirming the judgment of the court below, that the watercourse was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the license were wrongdoers, was subordinate to the convenience of innocent third persons and of the public.

Roberts v. Rose, 3 H. & C. 162; L. J., 33 Ex. 1, 241; affirmed, 4 H. & C. 103; L. R., 1 Ex. 82; L. J., Ex. 62.

Raising Dam.—Where a party has appropriated the waters of a stream for ditch purposes by means of a dam, and afterwards the stream becomes so filled with tailings from workings above that it becomes necessary to raise the dam to secure the water, it does not follow that he has the right so to raise the dam because of such unforeseen changes in the condition of the stream.

Nevada W. Co. v. Powell, 34 Cal. 109.

If such further act of appropriation cause injury to intervening appropriations, such intervening appropriations must be considered as prior thereto; the party attempting to raise such dam can not do so upon the ground of its being necessity, in order to secure only the full extent of his original appropriation.

Nevada W. Co. v. Powell, 34 Cal. 109.

The appropriation carried with it the right to erect all works necessary to the enjoyment of the water; but that appropriation being complete and acted on, subsequent locations could be made by others based upon the extent of that established appropriation, "unless there was something which manifested a further right."

Nevada W. Co. v. Powell, 34 Cal. 109.

Raising Dam—Backwater.—Plaintiffs owned certain mining claims and a quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water upon plaintiffs' claims and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: *held*, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.

Harvey v. Chilton, 11 Cal. 114.

Diminution of Supply.—The first appropriator of water for mining purposes is entitled to have the water flow, without material interruption, in its natural channel.

Bear River Co. v. N. Y. Mining Co., 8 Cal. 327; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him.

Bear River Co. v. N. Y. Mining Co., 8 Cal. 327; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity.

Phoenix W. Co. v. Fletcher, 23 Cal. 482.

Sensible Diminution.—The detention of water, resulting in its final diminution to extent of five per cent., is not a case of *de minimis*, etc., but a sensible injury for which an action will lie. So held as to water taken from an artificial watercourse supplied from coal mines.

Wood v. Wand, 3 Ex. 748.

Diminution by Second Appropriator.—What diminution or deterioration will constitute an invasion of the rights of the first appropriator of water will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is, whether his use and enjoyment of the water to the extent of his original appropriation has been impaired by the acts of the other parties.

Atchison v. Peterson, 20 Wall. 507; B. & W. L. C. 730, affirming 1 Mont. 561.

Interruption of Flow.—The owners of a ditch by which the waters of a stream have been first appropriated are entitled to recover damages for injury or loss sustained, caused by dam or other obstructions having been erected on the stream above the head of the ditch, by which the regularity of the flow of its waters is so disturbed as to cause actual injury or loss to the proprietors of the ditch.

Natoma W. & M. Co. v. McCoy, 23 Cal. 491.

Hydraulic—Irregular Flow.—One who enters upon a stream of water above the prior appropriator and erects hydraulic works must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator.

Phoenix W. Co. v. Fletcher, 23 Cal. 482.

A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong.

Phoenix W. Co. v. Fletcher, 23 Cal. 482.

§ 450. *Diversion*.—In an action for damages for diverting water from a mill, an averment of possession of the land and mill is sufficient without averring prior appropriation or riparian rights as against a trespasser.

McDonald v. Bear River Co., 13 Cal. 221.

Admission of Diversion.—A denial that defendants “wrongfully and illegally” diverted certain water is an admission of the act of diversion.

Harris v. Shontz, 1 Mont. 212.

Diversion—Pleading.—A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which have been diverted to their injury by defendants, sets forth a sufficient cause of action.

Leigh Co. v. Independent Ditch Co., 8 Cal. 323.

It is not necessary that the complaint should further allege an appropriation of the water or an ownership thereof.

Leigh Co. v. Independent Ditch Co., 8 Cal. 323.

Changing Point of Diversion.—A person appropriating and diverting the water of a stream at a given point can not afterwards change the point of diversion to the prejudice of a subsequent locator.

Butte T. M. Co. v. Morgan, 19 Cal. 609.

Damages for Diversion.—A verdict for damages in an action at law for diversion of water does not establish the quantity of water to which plaintiffs are entitled, nor is it to be presumed that the whole number of inches claimed in their complaint was proved to and found by the jury; and the averment of such former recovery is not of itself sufficient to support an injunction against further diversion.

McDonald v. Bear River Co., 15 Cal. 145.

No Diversion from a Ditch while Choked.—In an action for diverting water from the plaintiff’s ditch, where both parties claimed in part the waters of the same stream: *held*, that defendant was not liable for deficiency of water in plaintiff’s ditch, unless defendant was diverting more water than he was entitled to at the precise time that such deficiency existed.

Brown v. Smith, 10 Cal. 508.

Held, further, that plaintiff could not recover for alleged diversion of water from one of his ditches, if the jury believed that at the time of the alleged diversion such ditch was so filled

up with tailings that it was incapable of carrying off the water itself.

Brown v. Smith, 10 Cal. 508.

Joint Liability for Diversion.—For the diversion of water, defendants are jointly and severally liable, and the granting of separate trials is discretionary with the court.

Townsley v. Hornbuckle, 2 Mont. 580.

Side Canyons.—A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the canyon at the head of their ditch, entitles them to prove a diversion of water from the smaller branches of the canyon supplying water to that point.

Priest v. Union Canal Company, 6 Cal. 170.

Complaint for Diversion.—The gravamen of the complaint being the diversion of water, plaintiff may allege in the same count the actual diversion of water by dams erected by defendant, and the further obstruction to the flow of water in plaintiff's ditch by sediment from defendant's waste gates.

Gale v. Tuolumne Water Company, 14 Cal. 25.

§ 451. *Subterranean "Stream"—Prior Use.*—A valuable spring ceased to flow after the erection of a large pump at a copper mine above, and about five hundred and fifty yards distant: held, that where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land through which it flows may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring. But where the spring depends for its supply upon percolation through the land of the owner above, and in the use of the land for mining the spring is destroyed, such owner is not liable, unless the injury was caused by malice or negligence. The prior use of the spring for the uses of a tannery conferred no right of servitude over or through the land of an adjoining proprietor; nor would the enjoyment of the spring raise any presumption of a grant, for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress.

Wheatley v. Baugh, 25 Pa. St. 528; see sec. 440.

Underground Flow.—The owner of land through which water flows or percolates in an underground course has no right or interest in it which will enable him to maintain an action against a land owner, who, by mining in the usual manner on his own

land, drains away the water from the spring or well of the owner of the neighboring land and leaves it dry.

Acton v. Blundell, 12 Mee. & W. 324; B. & W. L. C. 758.

Quære: If the well had been ancient, whether the law would be different.

Acton v. Blundell, 12 Mee. & W. 324; B. & W. L. C. 758.

Where, by the mining upon adjoining land, a spring or well is drained, it is *damnum absque injuria*.

Acton v. Blundell, 12 Mee. & W. 324; B. & W. L. C. 758.

Drain Water.—Where water from coal mines had been permitted, for more than sixty years, to pass through a covered drain, forming an artificial underground watercourse: *held*, that the proprietor of mills who had made use of such water (for less than twenty years) could not maintain an action against a person through whose land such mine drain (sough) passed in its course, for the diversion of the water, as he was under no obligation to permit it to run through his land; although such party claims no right to such water or watercourse through or from the mine owner.

Wood v. Waud, 3 Ex. 748.

But an action lies in such case for the pollution of the water, or for its detention accompanied with an injury.

Wood v. Waud, 3 Ex. 748.

§ 452. *Reclamation into Natural Stream.*—Where water from an artificial ditch is turned into a natural watercourse and mingled with natural waters of the stream, for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not, in so doing, diminish the quantity of the natural waters of the stream to the injury of those who have previously appropriated such natural waters.

Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143.

The burden of proof devolves on the party thus mingling the waters belonging to him with that appropriated by others. He can only claim the quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143.

Carrying Water through Appropriated Stream.—Where defendants had brought water from foreign sources into a stream

where plaintiff had a prior right by appropriation, with the intention of diverting it at a point below, the court instructed that they could divert it "less such amount as might be lost by evaporation and other like causes," as defendants requested, but added that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as a prior locator. The instruction was held to have been properly explained, as in its original shape it was too general.

Burnett v. Whitesides, 15 Cal. 35.

The jury in such case having found plaintiff entitled to the use of so much water as would run in a ditch of a certain capacity, judgment was so entered and defendant enjoined from diverting the same: *held*, that the judgment was not erroneous in failing to mention or distinguish between the water of the stream and the water brought into it by defendants.

Burnett v. Whitesides, 15 Cal. 35.

Extension of Flume to Prevent Recaption of Water.—Plaintiff dug a ditch below defendant's hydraulic workings to catch the water, partly natural to the ravine and partly brought there by defendant, which escaped from defendant's flume, whereupon defendant extended his flume below the head of the ditch so as to prevent the utilization of the water by plaintiff. Plaintiff's ditch was within the lines of defendant's claims, but below their works, and on ground asserted to be worthless for mining purposes: *held*, 1. That defendant had a right to extend his flume whether it subserved any useful purpose or not; 2. That plaintiff had no right to build his ditch on defendant's claim.

Correa v. Frietas, 42 Cal. 339.

Incidental Use to Preserve the Flume.—Where parties have appropriated the waters of a stream and obtained the prior right by the commencement and partial completion of a ditch and flume, they have the right to use so much of the water as is necessary to preserve their flume from injury while in the process of construction.

Weaver v. Conger, 10 Cal. 233.

§ 453. *Relation of Mine Owner to Surface Streams.*—It seems that a party having a coal mine worked below the level of a watercourse ought to be in no worse position with relation to a party tampering with the water of such stream, to the injury of the coal mine, than a surface riparian proprietor.

Crompton v. Lea, L. R., 19 Eq. 115.

Right of Mining Claim to Bed of Stream.—A prior locator of a mining claim on the bank of a stream has the right to the use of the bed of the stream for the purpose of fluming or working his claim, and any subsequent erection, dam, or embankment which will turn the water back upon such claim, or hinder it from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions.

Sims v. Smith, 7 Cal. 148.

Canyon—Natural Channel.—An allegation that a certain canyon is the natural and proper channel and outlet for the water and tailings from plaintiffs' claims is not an averment that they have the right to the use of the canyon to convey the water and tailings, nor equivalent to such averment.

Stone v. Bumpus, 40 Cal. 428; S. C., 46 Id. 218.

Canyon Claim.—In an action to abate a nuisance and for damages, founded on section 249 of the practice act, plaintiffs charged in their complaint that the alleged nuisance was caused by the erection and maintenance by defendants of a dam across a canyon on which plaintiffs' mining claim was situated, and below their claim, by which the outlet for the water and tailings from their claims was obstructed to such an extent as to render its working impracticable. To which the defendants replied, admitting in effect the erection of the dam and its effect upon the work of the plaintiffs, but denying plaintiffs' title to the mining ground, or their right to work the same, and alleging that the ground worked by plaintiffs was, in fact, a part of their claim; and that the dam was erected for the purpose of working their claim, which could not be worked without it: *held*, by the court, that to enable the plaintiffs to recover, they must show: 1. That they own the ground claimed by them; 2. That the dam prevented their working it to advantage; 3. Alternatively, that defendants had no title to the bed of the canyon, or if they had, that their right was acquired subsequently to that of the plaintiffs, or if prior, that the dam was not needed to enable defendants to work to advantage.

Stone v. Bumpus, 40 Cal. 428; S. C., 46 Id. 218.

Although the plaintiffs might own the ground claimed by them, yet if the defendants had the prior right to mine, and could not mine without the dam, the plaintiffs can not recover. It is a case of *damnum absque injuria*.

Stone v. Bumpus, 40 Cal. 428; S. C., 46 Id. 218.

§ 454. *Prescription to Flood Lands.*—To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years; there must have been an actual occupation by the flow of water, to the knowledge of the owner, and such as to occasion damage and give him a right of action; and there must have been such a use of the premises and such damage as will raise a presumption that the owner would not have submitted to it unless the other party had acquired a right so to use it.

Grigsby v. Clear Lake W. Co., 40 Cal. 396.

Prescription Act.—A right to the flow of water along an artificial cut over the soil of another can not be acquired under the prescription act, 2 and 3 Wm. IV., c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character.

Gaved v. Martyn, 19 C. B., N. S., 732.

Tin-bounds Ditch.—A prescriptive right to an artificial stream of water, made for purpose of tin-bonders, can not be acquired by twenty years' user when there has been no abandonment of the water by the miners during that time.

Gaved v. Martyn, 19 C. B., N. S., 732.

§ 455. *Injuries from Mine Flooded by Reservoir.*—Where the owner of land, without willfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages. But if he bring upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief thereby occasioned. A. was the lessee of mines; B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines. These passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth from surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts,

flowed through the old passages, and flooded A.'s mine: *held*, that the defendant B. was liable for the injury, as having brought a thing upon his land which was capable of mischief if not there retained; and against any consequence of its escape, though without negligence, he must be responsible to parties injured.

Rylands v. Fletcher, L. R., 3 H. L. 330, affirming S. C., L. R., 1 Ex. 265.

Copper-works.—The permission for a long course of time to the owners of copper-works to use water convenient, but not absolutely indispensable, to their works, from a canal by the owners of the canal, upon consideration of the good-will and freight of the copper-works, in the shape of a mutual understanding, but continued for many years, does not create any equitable right, nor amount to a license. *Aliter*, had expenditures been made with the knowledge of the canal owners, for the operation of works to which such supply of water was the only resource.

Baukart v. Tennant, L. R., 10 Eq. 141.

Injury from Water Sold by Ditch Owner.—Where K. discharged water from his ditch above R.'s land in such place that it naturally would and did flow over and upon and injure R.'s land, K. is responsible for such injury; nor can K. shield himself from this responsibility because he may have sold this water at such place to miners, by whom it was used for mining purposes before, in the course of its flow, it reached R.'s land and occasioned such injury.

Richardson v. Kier, 34 Cal. 63.

§ 456. *Joint Wrong-doers*.—In such case, the fact that the miners so using the water contributed to and enhanced the injury sustained, and are joint tort-feasors with K., will not relieve K. from his liability or affect its measure.

Richardson v. Kier, 34 Cal. 63.

Threatened Subsidence.—Where mining operations have been carried so far as to cause the subsidence of land, and of the bed of a stream flowing over it, persons claiming rights in the water of the stream are not precipitate in bringing a bill to prevent obvious consequences, although no actual injury or deprivation of the water has yet happened.

Elwell v. Crowther, 31 Beav. 163.

§ 457. *Conveyance*.—A water right is, under the law of Montana, "such a species of realty" as to require for its transfer

the same form and solemnity as the conveyance "of other real estate."

Barkley v. Tieleke, 2 Mont. 59.

Reservation of Right in Deed—Incorporeal Hereditaments.—A. granted to B. a certain tract of land, "excepting and reserving out of the lands," besides mines, all streams upon the premises with the soil under the same, with the privilege of erecting mills and dams, "and also such part of the said land as may by the said dams be overflowed with water." Afterwards B. conveyed to C. a portion of the same tract with a similar reservation. C. built a dam which flowed back upon the land of B., and being sued in case by B., urged in defense that the land so overflowed was included in the exception of the grant from A. to B., and so never passed to B.; and further pleaded a parol license from A. to overflow the land: *held*, 1. That the direct interest in the soil had passed by deed from A. to B.; 2. That until A., the first grantor, had exercised his right and erected dams, the reservation was inoperative, and considered strictly as an exception was void for uncertainty, and an action was maintainable against the latter grantees by his grantors; 3. That the parol license from A. to C. to erect the dams was inoperative, as such right, being an incorporeal hereditament, could not pass by deed.

Thompson v. Gregory, 4 Johns. 81; S. C., 4 Am. Dec. 255.

Insufficient Notice.—The notice of intention to appropriate water must be sufficient to put a prudent man upon inquiry.

Kimball v. Gearhart, 12 Cal. 28.

Ownership of Water.—Where, in an action for damages to a mining claim by leakage from defendant's ditch, plaintiff asked a witness, "Did you see water splashing over the flume?" defendant was allowed in cross-examination to ask, "Whose water was that you saw splashing over the flume?" although the question might be considered as going to the ownership of the water.

Jackson v. Feather River Co., 14 Cal. 19.

Previous Right of Action.—The conveyance of a water claim does not transfer the right of action for damages for the past illegal use of the water.

Kimball v. Gearhart, 12 Cal. 28.

Grant of "Below the Mill."—The grant of "all the water which naturally flows" "below the mill" means the water as it flows from the mill-wheel, the mill being in operation.

Oregon Iron Co. v. Trullinger, 3 Or. 1.

CHAPTER XXII.

WATER RIGHTS.

§ 457. *Vested Rights to Use Water for Mining, etc.—Right of Way for Canals.*

§ 458. *Patents, Pre-emptions, and Homesteads, Subject to Vested and Accrued Water Rights.*

§ 459. *Conditions for Use of Water on Public Lands for Reclamation.*

§ 460. *Navigable Rivers within Public Lands to be Public Highways.*

§ 457. *Vested Rights to Use of Water for Mining, etc.—Right of Way for Canals.*—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

14 Stat. 253; R. S. 2339.

§ 458. *Patents, Pre-emptions, and Homesteads Subject to Vested and Accrued Water Rights.*—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

16 Stat. 218; R. S. 2340.

§ 459. *Conditions for Use of Water on Public Lands for Reclamation.*—The right to the use of water for the reclamation of desert lands, in accordance with the provisions of an act approved March 3, 1877, shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the

water of lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

19 Stat. 377.

§ 460. *Navigable Rivers within Public Lands to be Public Highways.*—All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

1 Stat. 468; 2 Id. 235; R. S. 2476.

CHAPTER XXIII.

DESERT LANDS.

- § 461. How and Where These Lands may be Purchased.
- § 462. Applicant must Show Right to Use of Water.
- § 463. What Declaration must Show.
- § 464. The Tract must be Compact in Form.
- § 465. On Unsurveyed Lands.
- § 466. Preliminary to Filing it must be Shown by Witnesses that the Land is
Desert Land.
- § 467. Where the Land is Situated on the Borders of Streams or Lakes.
- § 468. Desert Lands how Purchased—Declaration—Right to Use Water—
Water on Public Lands to be Free—Contents of Declaration—Per-
fection of Title—Limitation upon Quantity.
- § 469. Definition of Desert Lands.
- § 470. Localities to Which the Law Applies.

§ 461. *How and Where These Lands may be Purchased.*—The desert land law of March 3, 1877, is confined in its operation to the states of California, Oregon, and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota.

All lands, exclusive of timber and mineral lands, which will not without irrigation produce some agricultural crop, are deemed and held to be desert lands under this act.

Only one entry can be made by any one person, and the maximum quantity which may be embraced therein is one section of 640 acres.

A person desiring to avail himself of this law must be a citizen of the United States or must have declared his intention to become a citizen. He must first submit proof that the land is of a class which will not, without irrigation, produce any agricultural crop, and if it lies along streams or about bodies of water, that it will not produce hay without irrigation.

He must also file his sworn statement setting forth his qualification under the statute, and his intention to reclaim the tract applied for by conducting water thereon, within three years from date of his declaration.

If foreign born, he must produce the record evidence of his naturalization or of his having declared his intention to apply therefor, as the case may be.

The land must be described in the declaration by legal subdivisions if surveyed, and if not surveyed, by reference to conspicuous landmarks or the established lines of survey.

Thereupon, the entry will be allowed, the party paying twenty-five cents per acre, the register and receiver issuing their joint certificate, and within three years the applicant must produce satisfactory proof of having reclaimed the land applied for by conducting water thereon, after which he may perfect his entry by paying the additional sum of one dollar per acre.

This proof of reclamation must consist of the testimony of at least two disinterested and credible witnesses, who must appear in person before the register and receiver of the proper district land office.

The proof being found satisfactory and full payment made, the receiver issues his final receipt and the register his final certificate, on which the patent is issued.

No assignments are recognized by the department under this law.

§ 462. *Applicant must Show Right to Use of Water.*—When a party enters under the desert land act land agricultural in character, and such entry is afterwards canceled on this ground, the purchase money can not be refunded, when the evidence at a hearing to ascertain the character of the land indicates fraud on the part of the claimant.

Case of Thomas Gorman, 7 Copp's L. O., p. 8.

Sections 16 and 36 may be embraced in the desert land entry, if the land is unsurveyed; but if the surveys have so far progressed as to indicate which are the school sections, they can not be embraced in such entry.

6 Copp's L. O., p. 76.

The final certificate and patent in a desert land entry can not lawfully issue until after the public surveys have been extended over the land embraced therein.

6 Copp's L. O., p. 192.

Upon final proof the applicant must show a right to the use of water for irrigation purposes, and how that right is derived.

7 Copp's L. O., p. 26.

Proof that all the land has been cultivated is not necessary, but it must be shown that sufficient water has been brought upon the land to thoroughly irrigate it. Evidence that crops of

hay, vegetables, and cereals have been raised is satisfactory proof of reclamation.

7 Copp's L. O., p. 105.

§ 463. *What Declaration must Show.*—By desert lands is meant a class of lands which will not, without irrigation, produce any agricultural crop. Land along streams and around bodies of water, which produces grass suitable for hay without artificial irrigation, is not desert land within the meaning of the law, and such lands are not subject to desert entry. Title to desert lands in any of the following states and territories may be acquired under the act of congress of March 3, 1877, viz.: the *states of California, Oregon, and Nevada*, and the *territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota*.

Any party desiring to avail himself thereof must file with the register and receiver of the proper district land office a declaration in form prescribed, which must be under oath, and may be executed before either the register or receiver, or the clerk of any court of record having a seal. It must be set forth that the applicant is a citizen of the United States, or that he has declared his intention to become such, in which case a duly certified copy of his declaration of intention to become a citizen must be presented and filed. It must also be set up that the applicant has made no other declaration for desert lands under the provisions of this act, and that he intends to reclaim the tract of land applied for, not exceeding one section, by conducting water thereon, within three years from the date of his declaration. The declaration must also contain a description of the land applied for, by legal subdivisions if surveyed, or if unsurveyed, as nearly as possible without a survey, by giving, with as much clearness and precision as possible, the locality of the tract with reference to known and conspicuous landmarks or the established lines of survey, so as to admit of its being thereafter readily identified when the lines of survey come to be extended.

Circular, October 1, 1880.

§ 464. *The Tract must be Compact in Form.*—The law requires desert entries to be compact in form. The requirement of compactness will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its

relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity or equivalent of one section. But entries which show upon their face an absolute departure from all reasonable requirements of compactness, and being merely contiguous by the joining of ends to each other, will not be admitted, whether on surveyed or on unsurveyed lands.

Circular, October 1, 1880.

§ 465. *On Unsurveyed Lands.*—On unsurveyed lands the degree of compactness required will be such as, upon the adjustment of the lines after survey, will bring the land within the limits and general form of a technical section, or part thereof, as nearly as may be.

In no case will the side lines be permitted to exceed one mile and a quarter, when the full quantity of six hundred and forty acres is entered. When the entry embraces a less quantity than a whole section, or its equivalent, the limit to the side lines will be proportionately decreased.

Entries, whether by legal subdivisions on surveyed lands or of an irregular form on unsurveyed lands, running along the margins or including both sides of streams, and not being compact in any true sense, will not be permitted.

Circular, October 1, 1880.

§ 466. *Preliminary to Filing, It must be Shown by Witnesses that the Land is Desert Land.*—As preliminary to the filing of the declaration, it must be satisfactorily shown that the land therein described is *desert land*, as defined in the second section of the act. To this end the testimony of at least two disinterested and credible witnesses is required, whose testimony will be reduced to writing in the usual manner; or the evidence may be furnished in the form of affidavits executed before the clerk of any court of record having a seal, the credibility of the witnesses to be certified by said clerk. The witnesses must clearly state their acquaintance with the premises, and the facts as to the condition and situation of the land upon which they base their judgment. A form of affidavit, to be sworn to and subscribed by each witness, is attached.

Circular, October 1, 1880.

§ 467. *Where the Land is Situated on the Borders of Streams or Lakes.*—Where the land is situated on the borders of streams or lakes, evidence will also be required that the land in its natural state is not productive of hay. After proof has been made

to the satisfaction of the district officers, the receiver will receive from the applicant the sum of twenty-five cents per acre for the land applied for, the register will receive and file his declaration, and they will jointly issue, in duplicate, a certificate in the form attached.

One of these duplicates will be delivered to the applicant; the other will be retained by the register and receiver, with the declaration and proof. They will bear a number according to the order in which the certificate was issued. The register will keep a record of the certificates issued, showing the number, date, amount paid, name of applicant, and description of the land applied for in each case, and in addition, he will note the same upon his plats and records, as in cases of ordinary entry. At the end of each month he will, with his regular returns, forward to this office an abstract of the declarations filed and certificates issued under this act during the month, accompanying same with the declarations and proofs filed and the retained copy of certificate in each case. The receiver will also account for the money received under this act, in the usual form. At any time within three years after the date of filing the declaration and the issue of certificate, the proper party may make satisfactory proof of having conducted water upon the land applied for. This proof must consist of the testimony of at least two disinterested and credible witnesses, who must appear in person before the register and receiver. They must declare that they have personal knowledge of the condition of the land applied for, and of the facts to which they testify; and their testimony must be reduced to writing in the usual manner. The party must also present and surrender the duplicate certificate issued when the declaration was filed. When this is done, and the final proof made to the satisfaction of the district officers, the receiver will receive the additional payment of one dollar per acre, receipt therefor in duplicate, and give the party a duplicate receipt. The register will also issue a final certificate of purchase. They will give to these final certificates and receipts a special series of numbers, and will make separate abstracts of same at the end of each month, sending up therewith the final certificates, receipts, and proofs.

In cases where declarations shall be filed under this act for unsurveyed lands, the register and receiver will immediately forward copies of the declarations to the surveyor general, in order that the proper surveys may be made. The claimants will be required to take their claims by legal subdivisions when

the lines of public surveys shall have been extended over the same.

Circular, October 1, 1880.

§ 468. *Desert Lands may be Purchased.*—It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such," and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter; *provided, however*, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of 640 acres, shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding 640 acres to any one person, a patent for the same shall be issued to him; *provided*, that no person shall be permitted to enter more than one tract of land, and not to exceed 640 acres, which shall be in compact form.

18 Stat. 497; 19 Id. 377.

§ 469. *Definition of Desert Lands.*—All lands, exclusive of timber lands and mineral lands, which will not without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

18 Stat. 497; 19 Id. 377.

§ 470. *Localities to Which the Law Applies.*—This chapter shall only apply to and take effect in the states of California, Oregon, and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land office.

18 Stat. 497; 19 Id. 377.

CHAPTER XXIV.

REPAYMENTS.

- § 472. Applications, where Patent has been Issued—Mode of Proceeding.
- § 473. Applications for Repayment where Patent has not been Issued.
- § 474. Who are Assignees in Good Faith.
- § 476. Purchase Money Refunded where Sale can not be Confirmed.
- § 477. Refunding in Certain Cases, how Done.
- § 478. Repayments on Soldiers' Void Additional Homestead Locations.
- § 479. Purchase Money, Fees, and Commissions on Erroneous Entries, or where Sales can not be Confirmed.
- § 480. Regulations for Repayments—Warrants on Treasury for Same.

§ 471. The act of congress, approved June 16, 1880, being additional to the provisions of sections 2362 and 2363, revised statutes of the United States, provides in its *first* section for the repayment "to innocent parties" of the fees, commissions, etc., paid by them on fraudulent and void additional soldiers' and sailors' homestead entries which have been canceled.

Applications for repayment under this section must be accompanied by the duplicate receipt, or evidence of the loss of the same, and by a concise statement under oath setting forth all the facts and circumstances connected with the procurement and use of the fraudulent papers upon which the canceled entries were based, together with such documentary or other proof as may tend to establish the innocence of the parties relative thereto.

Repayment of fees, commissions, and excesses, under section 1, can be made only to the party who paid the same. A conveyance of the land in these cases will not be deemed to carry with it the right to repayment.

The *second* section of the act provides: 1. For the repayment of purchase money, and of fees, commissions, and excess payments, where entries of public lands are canceled for conflict, "or where, from any cause, the entry has been erroneously allowed and can not be confirmed;" and, 2. For the repayment of the excess purchase money paid on lands sold at double minimum prices which are afterwards found to have been salable at one dollar and twenty-five cents per acre.

§ 472. *Applications, where Patent has been Issued—Mode of Proceeding.*—Under section 2362 of the revised statutes, repay-

ment is authorized upon satisfactory proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed," while in section 2 of the act of June 16, 1880, it is provided that the secretary of the interior shall cause repayment to be made "when from any cause the entry has been erroneously allowed and can not be confirmed."

Under the former law, repayment was not authorized when the sale could be confirmed, but for failure of compliance with legal requirements on the part of the person making the same. The act aforesaid seems to change the old law in this, that it authorizes repayment, when from any cause the entry has been erroneously allowed and can not be confirmed.

If the records of the land office or the proofs furnished should show that the entry ought not to be allowed, it would be error to allow it. In such a case repayment would be authorized. But if a tract of land were subject to entry and the proofs showed a compliance with law, and the entry should be canceled because the proofs were false, it could not be held that the entry was erroneously allowed, and in such a case repayment would not be authorized.

§ 473. *Applications for Repayment where Patent has not been Issued.*—In cases of application for repayment under the second section, where patent has not been issued, the duplicate receipt must be surrendered. The applicant must also make affidavit that he has not transferred or otherwise incumbered the title to the land, and that said title has not become a matter of record. This affidavit may be made before either the register or receiver of the district land office, or before a notary public, or a justice of the peace, or other officer authorized to administer oaths. When made before a notary public or justice of the peace, a certificate of official character is required. If the duplicate receipt has been lost or destroyed, the party applying must advertise it, giving notice of his intention to apply for a repayment of the purchase money. This advertisement must be inserted weekly for six weeks in some newspaper circulating in the vicinity of the land. A copy of the advertisement, with the affidavit of the publisher that it was inserted the requisite number of times attached thereto, must accompany the papers in the case. Where the duplicate receipt has been lost or destroyed, a certificate will also be required from the proper recording officer, showing that the same has not become a matter of record, and that there is no incumbrance of the title to the

land thereunder. A like certificate must be furnished when the application is made by another than the original purchaser. Where a patent has been executed and delivered, it must be surrendered. Where the title has become a matter of record, and in all cases where patent has issued, a duly executed deed, relinquishing to the United States all right and claim to the land under the entry or patent must accompany the application. This deed must be duly recorded, and a certificate must also be produced from the proper recording officer where the land is situated, showing that said deed is so recorded, and that the records of his office do not exhibit any other conveyance or incumbrance of the title to the land.

Where a valid title has been conveyed by the United States to any part of the tract embraced in a canceled entry, a duly executed and recorded deed, reconveying to the United States the title derived therefrom, must accompany the application. The reconveyance to the United States must conform in every particular to the laws of the state relative to transfers of real property: in the case of a married man, a release of dower by the wife; and in case of executors or administrators, due proof of authority to alienate the estate. Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased. Where application is made by executors, a certificate of executorship from the probate court must accompany the application. Where application is made by administrators, the original, or a certified copy of the letters of administration, must be furnished.

§ 474. *Who are Assignees in Good Faith.*—Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statute so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or an attempted transfer of title thereto, would be against the settled policy of the government, and repugnant to section 3477 of the revised statutes. Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instru-

ments of assignment, or certified copies thereof, and also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources. Where there has been a conveyance of the land and the original purchaser applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee. In case of applications for the repayment of fees, commissions, etc., on canceled homestead and other entries, under the *second* section of the act, the duplicate receipt must be surrendered with a relinquishment of all right, title, and claim in and to the land described in the receipt indorsed thereon, attested by two witnesses, and acknowledged before the register and receiver, or before any officer authorized to take acknowledgments. If the duplicate receipt has been lost or destroyed, an affidavit stating the fact must be furnished, together with a relinquishment of the character indicated. The applicant must make affidavit that he has not made another entry with the credit of the fee and commission paid by him on the canceled entry.

In the case of applications for the repayment of double minimum excesses, the duplicate receipt must be surrendered. If lost or destroyed, an affidavit stating the facts must accompany the application.

§ 475. All applications for repayment under the above provisions must be made in writing and be signed by the party applying, and must describe the tract or otherwise designate the entry with certainty. They should be transmitted with all the papers in the case through the register and receiver of the proper district land office, who will make due report thereon.

§ 476. *Purchase Money Refunded where Sale can not be Confirmed.*—The secretary of the interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the treasury not otherwise appropriated.

4 Stat. 80; 11 Id. 387; R. S. 2362.

§ 477. *Refunding in Certain Cases, how Done.*—Where any tract of land has been erroneously sold, as described in the

preceding section, and the money which was paid for the same has been invested in any stocks held in trust, or has been paid into the treasury to the credit of any trust fund, it is lawful, by the sale of such portion of the stocks as may be necessary for the purpose, or out of such trust fund, to repay the purchase money to the parties entitled thereto.

11 Stat. 388; R. S. 2363.

§ 478. *Repayments on Soldiers' Void Additional Homestead Locations.*—In all cases where it shall be made to appear to the satisfaction of the secretary of the interior, upon due proof that innocent parties have paid the fees and commissions, and excess payments required upon the location of soldiers' additional homestead claims, located under section 2304 of the revised statutes, which claims were found to be fraudulent and void after location and the entries or locations made thereon canceled, the secretary of the interior is authorized to repay to such innocent parties the fees and commissions, and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase money on lands erroneously sold by the United States.

21 Stat. 287; Cir. G. L. O., Aug. 6, 1890; 7 Copp's L. O. 90.

§ 479. *Purchase Money, Fees, and Commissions on Erroneous Entries, or where Sales can not be Confirmed.*—In all cases where homestead or timber-culture or desert-land entries, or other entries of public lands, have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and can not be confirmed, the secretary of the interior shall cause to be repaid, out of any money in the treasury not otherwise appropriated, to the person who made such entry, his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the commissioner of the general land office; and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of \$1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

21 Stat. 287.

§ 480. *Regulations for Repayments; Warrants on Treasury for Same.*—The commissioner of the general land office shall make all necessary rules, and issue all necessary instructions, to carry into effect the foregoing sections relating to repayments, and the secretary of the interior shall draw his warrant on the treasury for the repayment of all purchase money, fees, commissions, and excesses, and the same shall be paid without regard to the date of the cancellation of the entries.

21 Stat. 287.

CHAPTER XXV.

RESERVATIONS.

- § 481. Reservations in Florida, how Sold.
- § 482. Sale of Military Sites under General Laws Prohibited; Proviso as to Florida.
- § 483. Minimum Price, how Fixed when Reservations are Sold.
- § 484. Reservations, how Surveyed.
- § 485. Sale of Buildings Belonging to United States.
- § 486. Sales of Lands with Buildings.

§ 481. *Reservations in Florida, how Sold.*—All public lands heretofore reserved for military purposes in the state of Florida, which, in the opinion of the secretary of war, are no longer useful or desired for such purposes, or so much thereof as said secretary may designate, shall be placed under the control of the general land office, and be disposed of and sold in the same manner and under the same regulations as other public lands of the United States; *provided*, that said lands shall not be so placed under the control of the general land office until the opinion of the secretary of war, giving his consent, is communicated to the secretary of the interior in writing, and filed and recorded.

11 Stat. 87.

§ 482. *Sale of Military Sites under General Laws Prohibited.*—Military sites which are or may become useless for military purposes shall not be subject to sale or pre-emption under any of the laws of the United States; *provided*, that this section shall not apply to military sites in the state of Florida, the sale of which is authorized by the preceding section.

11 Stat. 336.

§ 483. *Minimum Price, how Fixed when Reservations Sold.*—Whenever any reservation of public lands is brought into market, the commissioner of the general land office shall fix a minimum price, not less than \$1.25 per acre, below which such lands shall not be disposed of.

13 Stat. 374; R. S. 2364.

§ 484. *Reservations, how Surveyed.*—Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control

of the general land office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

13 Stat. 41; R. S. 2115.

§ 485. *Sale of Buildings Belonging to the United States.*—The secretary of the interior is authorized to cause all such buildings belonging to the United States as have been, or hereafter shall be, erected for the use of their agents, teachers, farmers, mechanics, and other persons employed amongst the Indians, to be sold whenever the lands on which the same are erected have become the property of the United States and are no longer necessary for such purposes.

5 Stat. 611; R. S. 2122.

§ 486. *Sale of Lands with Buildings.*—The secretary of the interior is authorized to cause to be sold, at his discretion, with each of such buildings as are mentioned in the preceding section, a quantity of land not exceeding one section; and on the payment of the consideration agreed for into the treasury of the United States by the purchaser, the secretary shall make, execute, and deliver to the purchaser a title in fee simple for such lands and tenements.*

5 Stat. 611; R. S. 2123.

* For authority of the president to make reservations for public purposes, see *Wilcox v. Jackson*, 13 Pet. 498; *United States v. Fitzgerald*, 15 Id. 407; *United States v. Chicago*, 7 How. 185; *United States v. Stone*, 2 Wall. 525; *Wolcott v. Des Moines Co.*, 5 Id. 681; *Grisar v. McDowell*, 6 Id. 363.

CHAPTER XXVI.

EASEMENTS.

- § 487. Navigable Rivers Public Highways--Streams not Navigable, Banks of.
- § 488. Right of Way for Highways over Public Lands.
- § 489. If Lands Granted for Right of Way are not Used, etc., to Revert to the Government.
- § 490. Mineral Locators' Rights of Possession and Enjoyment.
- § 491. Right of Way in Intersecting Veins in Mines.
- § 492. What Conditions of Sales may be Made by Local Legislature.
- § 493. Vested Rights to Use of Water for Mining, etc.; Right of Way for Canals.
- § 494. Patents, Pre-emptions, and Homesteads Subject to Vested and Accrued Water Rights.
- § 495. Right of Way, Materials, Station Grounds, etc., Granted to Railroads.
- § 496. Rights of Several Railroads through Canyon, Pass, or Defile--Crossing at Grade--Wagon Roads, Rights of.
- § 497. Private Lands and Possessory Claims, how Condemned.
- § 498. Profile of Road Claiming Benefits, when to be Filed--Disposal of Lands Subject to Right of Way--Forfeiture of Right.
- § 499. Application of this Act.
- § 500. Right to Alter, Amend, etc.
- § 501. Use of Public Domain by Telegraph Company.
- § 502. Use of Materials from Public Lands.
- § 503. These Rights not Transferable.
- § 504. Government to have Priority in Transmission of Messages.
- § 505. Government Entitled to Purchase Lines.
- § 506. Acceptance of Obligations to be Filed.
- § 507. Penalty for Refusal to Transmit Dispatches.
- § 508. Timber Lands to be Patented Subject to Accrued Right of Way and Water Rights.

§ 487. *Navigable Rivers Public Highways--Stream not Navigable, Banks of.*—All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

1 Stat. 468; 2 Id. 235; R. S. 2476.

§ 488. *Right of Way for Highways over Public Lands.*—The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

14 Stat. 253; R. S. 2477; Railway Co. v. Gordon, S. C. Mich., Oct. Term, 1879; 7 Copp's L. O. 158.

§ 489. *If Lands Granted for Right of Way are not Used, etc., to Revert to the Government.*—If any rail or plank road or macadamized turnpike company to whom the right of way or sites for watering places, depots, and workshops over and through the public lands of the United States was granted by the act of congress approved August 4, 1852, and by the acts amendatory thereto, shall at any time after its completion be discontinued or abandoned by said company or companies, the grants made by said acts shall cease and determine, and the lands shall revert back to the United States.

10 Stat. 28, 29, 683; 12 Id. 577; Decision Com. G. L. O., July 16, 1857.

§ 490. *Mineral Locators' Rights of Possession and Enjoyment.*—The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

17 Stat. 91; 19 Id. 52; R. S. 2322.

§ 491. *Right of Way in Intersecting Veins in Mines.*—Where two or more veins of mining claims intersect or cross each other, the owners of the mine last located shall have the right of way through the space of intersection for the purposes of the convenient working of the mine.

17 Stat. 96; 19 Id. 52; R. S. 2336.

§ 492. *What Conditions of Sale may be Made by Local Legislature.*—As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

14 Stat. 252; 19 Id. 52; R. S. 2338.

§ 493. *Vested Rights to Use of Water for Mining, etc.; Right of Way for Canals.*—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

14 Stat. 253; R. S. 2339.

§ 494. *Patents, Pre-emptions, and Homesteads Subject to Vested and Accrued Water Rights.*—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

16 Stat. 218; R. S. 2340.

§ 495. *Right of Way, Materials, Station Grounds, etc., Granted to Railroads.*—The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber, necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations,

not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

18 Stat. 482.

§ 496. *Rights of Several Railroads through Canyon, Pass, or Defile—Crossing at Grade—Wagon Roads, Rights of.*—Any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road; *provided*, that such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

18 Stat. 482.

§ 497. *Private Lands and Possessory Claims, how Condemned.*—The legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862," approved July 2, 1864.

13 Stat. 357; 18 Id. 482, 483.

§ 498. *Profile of Road Claiming Benefits, when to be Filed.*—Any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the

land office for the district where such land is located, a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided*, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

18 Stat. 483.

§ 499. *Application of This Act.*—This act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of congress heretofore passed.

18 Stat. 483.

§ 500. *Right to Alter, Amend, etc.*—Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

18 Stat. 483.

§ 501. *Use of Public Domain, etc., by Telegraph Company.*—Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

14 Stat. 221; 19 Id. 232; R. S. 5263.

§ 502. *Use of Materials from Public Lands.*—Any telegraph company organized under the laws of any state shall have the right to take and use, from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their lines of telegraph may be located as may be necessary for

their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

14 Stat. 221; R. S. 5264.

§ 503. *These Rights not Transferable.*—The rights and privileges granted under the provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or under sections 454–460, inclusive, shall not be transferred by any company acting thereunder to any other corporation, association, or person.

14 Stat. 221; R. S. 5265.

§ 504. *Government to have Priority in Transmission of Messages.*—Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the postmaster general shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

14 Stat. 221; 17 Id. 287, 366, 367; R. S. 5266.

§ 505. *Government Entitled to Purchase Lines.*—The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or under sections 454–460, inclusive, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the postmaster general of the United States, two by the company interested, and one by the four so previously selected.

14 Stat. 221; 18 Id. 250; R. S. 5267.

§ 506. *Acceptance of Obligation to be Filed.*—Before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the postmaster general of the restrictions and obligations required by law.

14 Stat. 222; R. S. 5268.

§ 507. *Penalty for Refusal to Transmit Dispatches.*—When-

ever any telegraph company, after having filed its written acceptance with the postmaster general of the restrictions and obligations required by the act approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or by sections 454-460, inclusive, shall, by its agents or employees, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by said sections, or by the provisions of section 221 of the revised statutes, authorizing the secretary of war to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and sea-board of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than \$100 and not more than \$1,000 for each such refusal or neglect, to be recovered by an action or actions at law in any district court of the United States.

17 Stat. 366, 367; 19 Id. 232, 252; R. S. 5269.

§ 508. *Timber Lands to be Patented Subject to Accrued Right of Way and Water Rights.*—All patents for lands within the states of California, Oregon, and Nevada, and in Washington territory, valuable chiefly for timber, but unfit for cultivation, which may be granted under the provisions of the act of congress approved June 3, 1878, shall not be held to abrogate the right of way of ditch and canal owners acquired under the provisions of the act of July 26, 1866, and all such patents shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

20 Stat. 89.

Right by Prescription.—In California, if the owners of a ditch constructed for conveying water use the same peaceably, openly, and exclusively, under a claim of right, with the knowledge of the owners of the land, for a continuous period of five years, they acquire by prescription an easement over the land for such ditch.

Campbell v. West, 44 Cal. 646.

Right of Way.—The reservation, so called, of a right of way and carriage of minerals in an indenture of lease is an easement created by grant of the lessee.

Durham & S. R. Co. v. Walker, 2 Q. B. 940; S. C., 2 Gal. & Dav. 326.

Lower Lands Charged with Servitude.—When two parcels of land, belonging

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to different owners, are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of the lower tract can not obstruct this flow. The owner of the upper tract has an easement to have the water flow over the land below, and the land below is charged with a corresponding servitude.

Agborn v. Conner, 46 Cal. 346.

Runs with the Title.—An easement obtained by prescription through tin-bonders inures to the benefit of the owner of the soil after its abandonment by the tin-bonders.

Ivemay v. Stoker, L. R. 1 Ch. App. 396.

Railroad Crossing.—An easement of crossing another railroad from a mine must be established by twenty years' user, uninterrupted and as of right. The continuity is broken by an interruption, and it is not exercised as of right if by leave from the proprietors of the road crossed.

Monmouthshire Con. Co. v. Harford, 5 Tyrw. 68.

Ore-washing Lands.—An action by the owner of a mill privilege, and a mill used in tanning hides, against defendant for washing iron ore in the stream above the mill, and filling up his vats, is an action respecting an easement on real estate, of which the supreme judicial court has exclusive jurisdiction.

Crittenden v. Algier, 11 Met. 281.

Grant of Surface Right.—The grant of a surface right, with a stipulation that it shall not be for the purpose of laying out a town, or building thereon, but only for the purpose of a coal-breaker, and dirt-room for the deposit of coal dirt, is the grant of an easement only, though it be in fee.

Big Mountain Co.'s Appeal, 44 Pa. St. 361.

Incidents Necessary to Enjoyment.—A party having an easement on the land of another may go upon the land for the purpose of the enjoyment of such easement to its fullest extent, either to construct or repair, or secure it from danger, doing as little damage as possible, and responsible for that damage, for the grant of a privilege carries with it everything necessary to its enjoyment.

Phila. C. & I. Co. v. Taylor, 7 Pac. L. R. 127; S. C., 5 Leg. Gaz. 392.

Flowage of Ore Mud.—Bushnell conveyed to defendants the right, after washing their ore in a stream running through his land, to discharge the dirt upon his meadow lot lying below on the stream. A great quantity of dirt accumulated upon this meadow lot, so that it spread and was carried upon plaintiff's pasture lot adjoining. *Held*, that defendants were not liable for any damage to the pasture lot resulting naturally from the discharge dirt on the meadow lot.

Bushnell v. Proprietors of Ore Bed, 31 Conn. 150.

Railroad Right of Way.—The act of congress of July 1, 1862, granting a right of way to the extent of 200 feet on each side of its tract to the Central Pacific Railroad Company, gives that company a right to the possession of the ground over which the grant extends, exclusive in its character, and that company may recover in ejectment the possession of any portion of the same from one who has wrongfully entered thereon.

C. P. R. R. Co. v. Benity, 5 Saw. 118.

CHAPTER XXVII.

SALINE LANDS.

§ 509. By act of congress of January 12, 1877, it was provided that where tracts of land are found to be saline in character, and therefore under pre-existing laws not subject to disposal, they shall be offered at public sale at not less than \$1.25 per acre, and if not then sold they shall be thereafter held subject to private entry at the same price as other public lands.

In reference to this act, the supreme court of the United States, in the case of *Morton v. Nebraska*, 21 Wall. 660, 675, say that the policy of the government (since the acquisition of the north-west territory and the inauguration of the land system) has been uniform to reserve salt springs from sale. This policy has been applied to the Louisiana territory acquired from France, in 1803, and probably would apply to the territory of Nebraska on general principles. Whether or not it does apply, under the act of July 22, 1854, "to establish the offices of surveyors general in New Mexico, Kansas, and Nebraska, it applies, at least, so far as to render void an entry where the salines at the time had been noted on the field-books, were palpable to the eye, and were not first discovered after entry."

Where *prima facie* evidence that certain tracts are saline in character is filed with the register and receiver of the proper land district, they will designate a time for hearing at their office, and give notice to all parties in interest, in order that they may have ample opportunity to be present with their witnesses. At the hearing the witnesses will be thoroughly examined with regard to the true character of the land, and whether the same contains any known mines of gold, silver, cinnabar, coal, or other valuable mineral deposit.

The witnesses will also be examined in regard to the extent of the saline deposits upon the given tracts, and whether the same are claimed by any person; if so, the names of the claimants and the extent of their improvements must be shown. The testimony should also show the agricultural capacities of the land, what kind of crops, if any, have been raised thereon, and the value thereof.

The testimony should be as full and complete as possible, and in addition to the leading points indicated above, everything of importance bearing upon the question as to the character of the land should be elicited at the hearing.

The register and receiver then transmit the testimony so taken to the general land office, together with their joint opinion thereon. Should the given tracts be adjudged agricultural by the land department they will be subject to disposal as such. Should the tracts be adjudged saline lands, the register and receiver will be instructed to offer the same for sale, after public notice at the local land office of the district in which the same shall be situated, and the same will be sold to the highest bidder for cash, at a price not less than \$1.25 per acre. If not sold when so offered, the land will be subject to private sale, for cash, as other lands are sold.

The provisions of this act do not apply to any of the territories, nor to any land within the states of Mississippi, Louisiana, Florida, California, or Nevada; none of which have any grant of salines by act of congress.

Circular of October 1, 188-.

CHAPTER XXVIII.

PRIVATE LAND CLAIMS.

MEXICAN GRANTS.

- § 510. Four Classes of Grants; from the Crown of Spain.
- § 511. In the Treaty of Guadalupe Hidalgo; in the Gadsden Treaty; Grants in Arizona and New Mexico.
- § 512. Grants to Pueblos.
- § 513. Grants under Colonization Laws of Mexico.
- § 514. Perfect Grants; Inchoate Grants.
- § 515. Surveys of Mexican Grants.

§ 510. *Four Classes of Grants.*—When a Mexican grant has for any reason been declared invalid, and the claim has been finally rejected, the land embraced therein becomes a part of the public domain, and may, after it has been declared open to entry, be acquired by individuals under the general laws of the United States. So, if upon a final survey and confirmation of a valid grant a portion of the land embraced within the boundaries should be rejected, the land thus rejected would become subject to sale under the laws of the United States. For these reasons it becomes necessary to consider very briefly in this chapter some of the great leading principles that govern the adjudication of titles through Mexican grants, and in the next chapter the laws that control surveys of the same. There are in the United States four classes of so-called Mexican grants:

1. Grants coming direct from the crown of Spain, prior to the independence of Mexico, of land then embraced in Mexican territory. These grants are very rare, and will not be separately considered here, except to refer to the case of the United States *v. Percham*, 7 Pet. 59.

§ 511. *In the Treaty of Guadalupe Hidalgo; in the Gadsden Treaty; Grants in Arizona and New Mexico.*—2. Grants (so-called) where the land, after certain preliminary proceedings, were put up at auction and sold to the highest bidder. In other words, they are executed contracts of purchase, instead of grants. They are confined to the land acquired under the Gadsden treaty, and are located principally in New Mexico and Arizona. The system provided by congress for the investigation of these titles is very simple, and as imperfect and inadequate as it is simple.

It authorizes, and indeed makes it the duty of, each surveyor general "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." It requires him to investigate all claims which originated before the treaty of Guadalupe Hidalgo, and report his decision as to the validity or invalidity of the same to congress for its final action.

10 Stat. 309.

This law was a grave mistake on the part of congress; no good, and many evil, results have followed its adoption.

If there is any position in the government which requires eminent judicial ability, it is that which passes upon or makes recommendations in reference to these titles. This judicial ability is not usually found in the person of a surveyor general. When the decision of the surveyor general reaches congress many years elapse before any action can be obtained, and then it is usually (or has been thus far) the wrong kind of action.

There are two instances known to the writer where congress has taken action on the recommendation of a surveyor general, both of which are in reference to land in New Mexico; one known as the Maxwell grant, and the other as the Cañon del Agua grant. In both these cases the secretary of the interior has recommended suit to be brought by the United States government to vacate the patents on the ground of fraud.

In the Maxwell grant, Secretary Kirkwood seems to think, from the evidence before him, that about one million of acres in excess of what should have been included have been embraced in the grant. And there seems to be no legal remedy for these stupendous frauds, as the supreme court of the United States have held that neither that nor any other forum have any jurisdiction or power to set aside or inquire into any of the proceedings under this law, where, upon the decision or recommendation of a surveyor general, congress has confirmed one of these grants.

Tameling v. United States, 3 Otto, 644.

The system is wholly bad, impolitic, unwise, and unjust, and I venture to say that the law should be repealed and these questions referred to the courts.

§ 512. 3. *Alcalde Grants to Pueblo Lands*.—By the laws of Spain and Mexico, pueblos or towns having a municipal government were invested with the ownership lands.

Under the laws of the Indies, whenever a pueblo was formed, by a grant to the founder, or the union of ten or more families,

or the foundation of a presidio, or the secularization of a mission, each pueblo was entitled in property to certain tracts of land within the limits of the town to be set apart by them, called commons, pasture grounds, and municipal land, by virtue of their organization as pueblos.

Whether the Mexican government retained any power to make grants within the limits of a pueblo or not, the right of the pueblo to have the municipal and common lands assigned was an acknowledged equity, charged with which the United States government succeeded to the fee. The act of congress of 1851 operated as a grant to the pueblos of all lands within their limits vacant and ungranted on the seventh day of July, 1846.

Welch v. Sullivan, 8 Cal. 165.

A pueblo, when once legally established, became entitled to four square leagues of land, to be surveyed in the form of a square or quadrangle, and marked by boundaries which could be readily known, by official authority.

Stevenson v. Bennett, 35 Cal. 424.

This right might be forfeited unless presented to the land commission within the time prescribed.

Stevenson v. Bennett, 35 Cal. 424.

At the date of the conquest, San Francisco was a Mexican pueblo, and at any time after the conquest and before the adoption of the constitution of the state, an alcalde could make a valid grant of pueblo lands.

Scott v. Dyer, 54 Cal. 430.

Judges of the first instance, and in their absence alcaldes, possessed the municipal power to grant pueblo lands in California.

Dewey v. Treawell, 16 Cal. 220; Welch v. Sullivan, 8 Id. 165; Cohas v. Raisin, 3 Id. 443.

Alcalde grants were intended to be gifts and not sales; and when the grantee was required to pay a municipal tax or fee, its payment was not a condition precedent to the exercise of the granting power, nor did a failure to pay it defeat or invalidate the grant.

Donner v. Palmer, 31 Cal. 500.

§ 513. 4. *Grants under Colonization Laws of Mexico.*—We now come to the fourth and last, and by far the most important, class of grants: those to governors of Mexican states under the colonization laws of the country.

The authority to make these grants was lodged solely in the

governor. It was not shared by him with the departmental assembly, although it was his duty to submit a grant to the said assembly, and afterwards, with the assembly's report, to the supreme government; but the neglect of this did not impair the estate of the grantee. It simply suspended his rights. After the action of the departmental assembly, whether of approval or disapproval, it became the duty of the governor to forward the necessary documents, with the report of the territorial deputation, to the supreme government, and until the approval of that government the grant was subject to be defeated.

Ferris v. Coover, 10 Cal. 589.

The granting of papers, or the papers which evidence the grant, are known in the Mexican law as the *expediente*. When complete, it consists of the petition, with the *diseño* or map attached, a marginal decree approving the petition, the order of reference to the proper officer for information, the report of that officer in conformity to the order, the decree of concession, and the copy or a duplicate of the grant.

United States v. Knight, Adm'r, 1 Black, 247.

There is a provision in all the treaties with Mexico to the effect that rights acquired under these grants shall be respected by the United States; and, indeed, they would be so respected and protected under the law of nations, in the absence of treaty stipulations.

People change their allegiance; their relations to their ancient sovereign may be dissolved; but their relations to each other and their rights of property remain undisturbed.

United States v. Aredondo, 6 Pet.; United States v. Perchman, 7 Id. 59.

The eighth article of the treaty of Guadalupe Hidalgo, which was adopted and incorporated into the Gadsden treaty by the fifth article of the latter, contains the following clauses:

"In the said territories, property of every kind now belonging to Mexicans not established there shall be inviolably respected."

"The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to the United States."

Before a grant became definite under the Mexican law it was necessary that it should receive the approval of the departmental assembly, and that judicial possession should be given by survey.

Miller v. Dale, 44 Cal. 562; Schmitt v. Giovanari, 43 Id. 617.

Where there is a perfect Mexican or Spanish grant, no confirmation under the laws of the United States is necessary to vest title; but if the party holding it wishes a patent he must seek the same through a confirmation. A confirmation, however, in case of inchoate grants, is absolutely necessary, but in the mean time the party is entitled to the possession of the grant to its exterior boundaries, if it is for a specific quantity within the exterior limits of a larger tract, until confirmation and segregation by the government.

Rich v. Maples, 33 Cal. 102.

Since the act of congress of 1860, taking the surveys of Mexican grants from the executive department and placing it in the judicial, the final confirmation of a grant is the final judgment of the court on the question of location, and not the issuance of a patent. The decree has the force of *res adjudicata* against all persons, whether they intervened or not.

Yates v. Smith, 38 Cal. 60; S. C. affirmed, 40 Id. 662.

Where two grants were located on the same land in California, it was held that the patentee under the elder grant, though it was the last located and patented, had the better title.

Bissell v. Henshaw, 18 Wall. 255.

§ 514. *Perfect Grants; Inchoate Grants.*—In order to convey title there must be a grantee, and where the grant is to John A. Sutter and twelve families, the legal title will pass to John A. Sutter alone.

Ferris v. Coover, 10 Cal. 589.

And it is equally important that the land should be so described in the grant that a survey and segregation of the same can be made from such description. A Spanish grant in Florida for six miles square, "at the place called Dunn's Lake, upon the river St. Johns," was held to be too vague to be confirmed, even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water power.

United States v. Lawton, 5 How. 10.

Courts will take cognizance of all equities between the grantee and third parties in regard to the land granted; but a bill to set aside a judgment or decree for fraud will not be sustained, unless the facts constituting the fraud alleged were extrinsic and collateral to the matter tried, and not a fraud which was in issue in the former suit.

United States v. Throckmorton, 8 Otto, 61.

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It was held in a Florida case that a complete unrecorded title was not barred as against the United States by any act of congress, though barred as against one desiring title from the government.

United States v. Power's Heirs, 11 How. 570.

But in *Fremont's Case*, 17 How. 542, it was held that not only inchoate titles, but complete legal titles also must be passed upon by the court.

As to what is necessary to be set forth in a petition to give jurisdiction to commissioners, see *Beard v. Federy*, 3 Wall. 478. If no appeal be taken by the United States, they may appear as appellees, but can not demand a reversal or change of the decree.

It was held in the *Fossatt Case*, 2 Wall. 649, under the act of 1851, that a patent is not conclusive of the equitable rights of third parties; also in *Meadon v. Norton*, 11 Wall. 442. But under the act of 1860, all parties claiming any interest must intervene or be concluded. These proceedings are judicial, and are in the nature of proceedings *in rem*.

Bissell v. Henshaw, 1 Saw. 553.

Though perfect Spanish titles need no confirmation, yet titles granted on conditions not performed, and for the non-performance of which no excuse is shown, are void as against the government.

United States v. Wiggins, 14 Pet. 334.

A concession on condition becomes absolute when the condition is performed.

United States v. Clarke, 9 Pet. 168.

But a recital in a Spanish grant of one of its considerations will not be deemed a condition if not declared to be so.

United States v. Rodman, 15 Pet. 130.

No question having been raised in the court below as to the grant being a fraudulent one, it can not be questioned on that ground in the supreme court.

United States v. Combuston, 20 How. 59.

The departmental assemblies had no power to alien the public domain, except for purposes of settlement or cultivation; the right to dispose of it for other purposes rested with the supreme government alone.

United States v. Vigil, 13 Wall. 449.

The decree of 1824 and the regulations of 1828 forbade the

colonization of territory comprehended within twenty leagues of the boundaries of any foreign state, and within ten leagues of the sea-coast, without the consent of the supreme executive power.

Arguello v. United States, 18 How. 539, 553.

But this restriction only embraced grants to empresarios who intended to introduce large colonies of foreigners; it did not prohibit grants within those limits to native citizens.

Arguello v. United States, 18 How. 539, 553.

The consent of the federal executive of Mexico was essential to the validity of a grant of land within ten leagues of the coast.

League v. Egery, 28 How. 264.

The law of 1824 and the regulations of 1828 were the only Mexican laws on the subject of granting lands in the territories (except those regulating towns and missions), and the authority of the governors and other officers is defined to them.

United States v. Vallejo, 1 Black, 541; *United States v. Castillero*, 2 Id. 17.

No grant was complete under the colonization laws without the approval of the department assembly, and these laws forbade the granting of more than eleven square leagues.

Juridical possession under the former government of a Mexican grant is a segregation of the grant from the public lands, and is equivalent to a judicial determination of the boundaries of the grant.

Letter of Secretary Delano to Commissioner Drummond, Copp's L. L., vol. 1, p. 533.

Ejectment may be maintained on inchoate grant.

Cornwall v. Culver, 16 Cal. 423; *Riley v. Heisch*, 18 Id. 198; *Mahoney v. Van Winkle*, 21 Id. 552.

For a complete list of authorities, see title Private Land Claims, in Citation of Decisions.

§ 515. *Survey of Mexican Grants*.—For the purposes of survey, these grants may be divided into three classes:

1. Grants by specific boundaries, where the survey must follow the boundaries as defined.

2. Grants by quantity, where the amount of land may be surveyed off within certain exterior limits.

3. Grants of a certain *place* by name, either with or without boundaries, where the donee is entitled to the tract according to the boundaries, if given, and if not, according to the possession and settlement.

Heguera v. United States, 5 Wall. 827; 8 Id.

All questions as to location and surveys are administrative in their character, and must be disposed of in the land office, and the action of the land department is not subject to review by the courts, however erroneous. If no opposition is made there, a party is concluded by his laches.

Ballance v. Forsyth, 24 How. 183; *United States v. Flint*, 4 Saw. 42; Id. 603.

The commissioner of the general land office has jurisdiction to revise and set aside a survey of a grant made by the surveyor general of a state.

Bissell v. Henshaw, 18 Wall. 255.

And when a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the secretary of the interior may recall it.

McGuire v. Tyler, 8 Wall. 650.

And it is possible that under special circumstances an appeal may be made to the president.

Shepley v. Cowan, 1 Otto, 330.

The description in a grant of the land granted, so that the same can be surveyed, is indispensable; and if the description be so vague as to render a survey impossible, the grant is void.

United States v. Lawton, 5 How. 10; *Smith v. United States*, 10 Pet. 326.

The political power alone is competent to determine, as between two claimants setting up distinct imperfect titles under the former government to the same parcel of land, and the administrative power is alone competent to direct and control the survey.

McGuire v. Tyler, 8 Wall. 650.

Where two floating grants are located and a survey is made under each of them on the same land, the one first located and surveyed takes precedence and holds the land.

Miller v. Dale, 2 Otto, 473.

Where juridical possession has been given by the former government by a survey of the premises, the boundaries thus established should control the officers of the United States in surveying the land. A survey by a surveyor general of the United States of a claim thus confirmed is inoperative, however, until finally approved by the land department at Washington.

Van Reynegan v. Bolton, 5 Otto, 33; *Graham v. United States*, 4 Wall. 259.

The land granted must be taken as near as may be to the

place described in the petition, and can not be taken elsewhere, and if it can not be found there, the grantee has no claim for an equivalent, and if it should be found to interfere with previous grants to third persons, the concession will be limited in quantity according to the extent of the rights of third persons, and an equivalent for such diminution can not be surveyed elsewhere.

United States v. Heirs of Aredona, 13 Pet. 81, 133.

Where land has been granted in one place courts have no power by a decree to grant an equivalent in another; but where a grant is for land mentioned, or for any other vacant land, the survey may be made in two or more places.

United States v. Heirs of Clarke, 16 Pet. 228.

A grant from the former government may convey complete title, though conditions and qualifications are attached to it.

Maynard's Heirs v. Massey, 8 How. 314; *Fremont v. United States*, 17 Id. 542.

§ 516. Courts will take cognizance of all equities with reference to the land granted, or the survey thereof, existing between the grantee and third parties; but a bill to set aside a judgment or decree for fraud will not be sustained unless the facts constituting the fraud alleged were extrinsic, and collateral to the matter tried, and not a fraud which was in issue in the former suit.

United States v. Trockmorton, 8 Otto, 61.

The calls of a deed control all other descriptions.

Sturgeon v. Floyd, 3 Rich. 80; *McClintock v. Rodgers*, 11 Ill. 279.

And the supreme court of the United States, in the case of *Van Reynegan v. Bolton*, 5 Otto, 33, uses the following language in speaking of calls and monuments: "Where juridical possession is given by survey, it establishes the boundaries of the land granted, and this should control the officers of the United States in surveying the land."

The approval of a survey takes effect only after publication of the same as directed by law, and the date of approval is the date of survey.

Copp's L. L., vol. 2, p. 1205.

Where a private land claim is confirmed for quantity within larger exterior limits, the claimant may select the location of his grant anywhere within such limits, so as not to defeat the prior equitable rights of others, unless the grantees are estopped from making such selection by some act of themselves.

Copp's L. L., vol. 2, p. 1199.

When all the elements prescribed by a decree can not possibly be complied with, a survey which conforms to it as near as may be will not be disturbed.

Dehon v. Bernal, 3 Wall. 774.

As to what amounts to a survey according to the laws of Spain, see

Glenn v. United States, 13 How. 250; Winter v. United States, Hempst. 344; De Villemont v. United States, Hempst. 389; S. C., 13 How. 261.

Land Measures and Measurements.—The Mexican vara is the unit of all the measures of length, the pattern and size of which are taken from the Castilian vara of the monk of Burgos, and is the legal vara used in the Mexican republic. It is equal to nine hundred and sixteen thousand four hundred and sixty-nine millionths of an English imperial yard. Fifty Mexican varas make a measure which is called a cordel, which instrument is used in measuring land. The legal league contains 100 cordeles or 5,000 varas, which is found by multiplying 100 by 50 varas contained in a cordel. The word sitio is frequently used.

It was determined between the two governments, under a treaty in regard to Mexican bonds, that the term "sitio de gañado moyer" included and was intended to include 4,338,964 acres in that particular case.

See Mexican Ordinance for Sea and Land, Copp's L. L., 1st ed., p. 621.

CHAPTER XXIX.

PRIVATE LAND CLAIMS.

- § 516 a. Patents to Issue for Claims heretofore Confirmed.
- § 516 b. Price of Surveys, how Fixed.
- § 516 c. Certificates of Location or Scrip to Issue in Satisfaction of Confirmed Private Land Claims which can not be Located.
- § 516 d. Issuance and Location of Judicial Scrip in Lieu of Confirmed Private Land Claims.

§ 516 a. *Patents to Issue for Claims heretofore Confirmed.*—In case of any claim to land in any state or territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been or may hereafter be made, to issue patents for the claims so confirmed, upon the presentation to the commissioner of the general land office of plats of survey thereof, duly approved by the surveyor general of any state or territory, if the same be found correct by the commissioner. But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.

10 Stat. 599; R. S. 2447.

§ 516 b. *Price of Surveys, how Fixed.*—The commissioner of the general land office has power, and it shall be his duty, to fix the prices per mile for public surveys, which shall in no case exceed the maximum established by law; and under instructions to be prepared by the commissioner, an accurate account shall be kept by each surveyor general of the cost of surveying and platting private land claims, to be reported to the general land office, with the map of such claim, and patents shall not issue for any such private claim until the cost of survey and platting has been paid into the treasury by the claimant.

12 Stat. 409; 18 Id. 304; R. S. 2400.

§ 516 c. *Certificates of Location or Scrip to Issue in Satisfaction of Confirmed Private Land Claims Which can not be Located.*—Where any private land claim was confirmed by congress prior

to June 2, 1858, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant or his legal representatives, certificates of location for a quantity of land equal to that so confirmed and unsatisfied, which certificates of location or scrip shall be subdivided according to the request of the confirmer or confirmeres, and as nearly as practicable in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the same in his own name upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding \$1.25 per acre, and shall be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants.

11 Stat. 294, 295; 20 Id. 274, 275.

§ 516 *d. Issuance and Location of Judicial Scrip in Lieu of Confirmed Private Land Claims.*—Whenever, in cases prosecuted under the acts of congress of June 22, 1860, March 2, 1867, and the first section of the act of June 10, 1872, providing for the adjustment of private land claims in the states of Florida, Louisiana, and Missouri, the validity of the claim has been, or shall be hereafter, recognized by the supreme court of the United States, and the court has decreed that the plaintiff or plaintiffs is or are entitled to enter a certain number of acres upon the public lands of the United States, subject to private entry at \$1.25 per acre, or to receive certificate of location for as much of the land, the title to which has been established, as has been disposed of by the United States, certificate of location shall be issued by the commissioner of the general land office, attested by the seal of said office, to be located as provided for in the sixth section of the aforesaid act of congress of June 22, 1860, or applied according to the provisions of this section; and said

certificate of location or scrip shall be subdivided according to the request of the confirnee or confirnees, and as nearly as practicable in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be, and *are* hereby declared to be, assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the scrip in his own name; such scrip shall be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants.

12 Stat. 85, 86; 20 Id. 274, 275.

CHAPTER XXX.

RAILROAD GRANTS.

- § 517. Grants Prior to 1862.
- § 518. To States for Railroads.
- § 520. Grant to Union Pacific Railroad.
- § 521. Grant to Northern Pacific, Atlantic and Pacific, and Southern Pacific Railroads.
- § 522. General Classification of Grants.
- § 527. Grant to California and Oregon Railroads.
- § 528. Grant to Central Pacific Railroad.
- § 529. Grant to Texas Pacific Railroad.
- § 530. Definite Line.
- § 531. Rights of Way for Railroads.
- § 532. Forfeiture.
- § 534. Settlers' Rights on These Grants.
- § 535. Grants *in præsentia*; Certification to Railroad Corporations; Effects of Mortgage.

§ 517. *Grant Prior to 1862.*—September 20, 1850, congress granted to the state of Illinois, to aid in the construction of a railroad, alternate sections of land for six sections width on either side of the road. This was the first railroad act of real importance, and initiated the system of grants of land for railroads by congress, which prevailed until after July 1, 1862. The legislative history of this act, as given by the Hon. Stephen A. Douglas, who was its chief supporter, is very interesting, and characteristic of that distinguished man. It may be found on page 262 of congressional book entitled "The Public Domain."

Prior to July 1, 1862, there had been constant agitation of the question of a railroad to the Pacific, beginning about the time of the settlement of the northern boundary by the Ashburton treaty of 1842.

In 1845 Senator Douglas proposed a grant of alternate sections of land to the states of Ohio, Indiana, Illinois, and Iowa, to aid in the construction of a railroad from Lake Erie *via* Chicago and Rock Island to the Missouri river, and prepared a bill (upon which he issued an address to his constituency) to organize the territory of Nebraska, extending from the Missouri river westward, etc., as well as a bill to organize the territory of Oregon, from the summit of the Rocky mountains to the Pacific ocean, and to reserve to each of said territories the alternate sec-

tions of land for forty miles on each side of a line of railroad from a point on the Missouri river where the Lake Erie road should cross the same, and thence to the navigable waters of the Pacific, in the territory of Oregon, or on the bay of San Francisco, in the event that California should be annexed in time.

After 1850 Eli Whitney petitioned congress for a grant of 100,000,000 acres of land, to enable him to construct a railroad to the Pacific ocean. This application was vigorously pushed, but, like all previous efforts of the kind, failed.

Soon afterwards, the government of the United States, under the war department, organized and executed a series of transcontinental surveys and explorations from the Mississippi river westward to the Pacific ocean, for ascertaining the most practicable and economical railroad route to the Pacific. The report reviewed the resources and prospects of the following routes: The extreme northern route (Stevens'), between the forty-seventh and forty-ninth parallels of north latitude; the route of the forty-first parallel (Mormon route); the route of the thirty-eighth parallel (Benton's great central route); the route of the thirty-fifth parallel (Rusk's route); and the route of the thirty-second parallel (El Paso and Gila to the Pacific), through the Gadsden purchase.

On the first day of July, 1862, the Union Pacific Railroad Company was incorporated by a direct act of the congress of the United States. They were to build a railroad and telegraph line from the Missouri river to the Pacific ocean. The land grant was direct to the corporation, thus avoiding the established rule of using a state as a trustee and agent of transfer. This was a complete change in the system of land bounties to aid in the building of railroads. The system thus inaugurated has resulted in four transcontinental lines with land grants, all of which are either completed or approaching completion.

§ 518. *Grants to States for Railroads.*—The initial act, so to speak, of the present railroad grant system is that of September 20, 1850 (9 Stat. 466), granting lands to the states of Illinois, Mississippi, and Alabama. This act provides, first, that "a copy of the survey of said road and branches, made under the direction of the legislature, shall be forwarded to the proper local land offices, respectively, and to the general land office at Washington city, within ninety days after the completion of the same."

Section 2 of the act contains the granting clause, and its provisions are in words of present grant: "That there be and is

hereby granted," etc.; "but in case it shall appear that the United States have, when the line or route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said state, to select," in the manner provided in the act, indemnity for the said lands so sold or held under pre-emption right.

The act makes no requirement of an executive withdrawal, but vests title at once in the state for the proper quantity of lands, upon the definite location or fixing of the line of road, and allows ninety days after completion of the survey thus fixing the line for the filing of a copy in the offices of the government.

Similar to this is the act granting lands to Missouri, June 10, 1852 (10 Stat. 8), except that the word "location" is used instead of "survey" in the first section, requiring a copy to be made and filed under the direction of the legislature; clearly indicating that the terms "survey" and "location" are identical in meaning and significance.

The act of February 9, 1853 (10 Stat. 155), granting lands to Arkansas, completes the legislation of this particular class.

§ 519. Next comes the grant to Iowa, of May 15, 1856 (11 Stat. 9), in like words of present grant, with indemnity for tracts sold, etc., "when the lines or routes of said roads are definitely fixed," but without any direction for ascertaining the manner of determining what shall be deemed a definite location, and without any provision requiring either the filing of the same in the government offices, or an executive withdrawal of lands.

Grants in precisely similar terms were made to Florida and Alabama, May 17, 1856 (11 Stat. 17, 18, 20, 21); to Mississippi, August 11, 1856 (11 Stat. 30); to Minnesota and Alabama, March 3, 1857 (11 Stat. 195); to Kansas, Michigan, and Wisconsin, March 3, 1863 (12 Stat. 772, 797); to Wisconsin, May 5, 1864 (13 Stat. 66); and to Minnesota, May 12, 1864 (13 Stat. 74).

§ 520. *Grant to Union Pacific Railroad.*—The act of July 1, 1862 (12 Stat. 459), for the Union Pacific and branches, in terms grants all alternate sections designated by odd numbers, not sold, reserved, etc., "at the time the line of said road is definitely fixed," and makes no indemnity provision whatever. The seventh section requires the filing of a map of general location and a withdrawal thereon, extending five miles beyond the limits prescribed for the grant to take effect on each side; thus

allowing for a possible deviation of ten miles on the definite location from the proposed route, without losing the land thus set apart prior to such location for the satisfaction of the grant. The act of July 2, 1864 (13 Stat. 356), enlarges the grant, but does not materially change its provisions in other respects.

On the main line, from one hundred miles west of Omaha to Salt Lake city, the map of general route was filed, as required by the acts, in June, 1865, yet no withdrawal was made. Not until after the definite location were the lands withheld from settlement, and on a portion of the line not until the road was constructed and in actual operation.

The act of 1864 required the Burlington and Missouri River Railroad Company, preliminarily to a withdrawal, to file a map of its established line with the secretary of the interior, the grant taking effect, however, when "the line of said road is definitely fixed." (See section 19.)

§ 521. *Grant to Northern Pacific Railroad.*—The Northern Pacific act of July 2, 1864 (13 Stat. 365), grants every alternate section, etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." The sixth section, however, excludes from "sale or entry or pre-emption, before or after they are surveyed," all the odd sections for forty miles in width on each side of the general route when fixed; thus making a complete legislative withdrawal long prior to the attachment of the grant by definite location of the road, and without any provision whatever requiring an executive withdrawal.

Of the same nature were the grants to the Placerville and Sacramento Valley Railroad Company, July 13, 1866 (14 Stat. 94); the Atlantic and Pacific and Southern Pacific companies, July 27, 1866 (14 Stat. 292); and the Stockton and Copperopolis Railroad Company, March 2, 1867 (14 Stat. 548). The first and last of these have been declared forfeited by acts of congress, and the lands restored to entry.

The grant to Michigan, June 20, 1864 (13 Stat. 140), provides "that when the governor of the state of Michigan shall furnish the secretary of the interior with maps and charts showing the definite location of the line of each of said roads, it shall be his duty to have the land granted to each of said roads withheld from market and reserved exclusively for the purposes aforesaid."

This provision, substantially, is found in the following grants, viz.: To Minnesota, March 3, 1865 (13 Stat. 526); to Missouri,

Arkansas, and Minnesota, July 4, 1866 (14 Stat. 83, 87); to Kansas, July 23, 25, and 26, 1866 (14 Stat. 210, 236, 289).

§ 522. *General Classification.*—It will be observed that there are no less than five general classes of grants, all couched in words of present grant, all having relation to date of definite location, but differing vitally in their provisions and requirements respecting the filing of maps and the withdrawal of lands. *The first class* embraces grants required to be definitely located by legislative authority of the state, and taking effect upon the exercise of that authority, but giving ninety days thereafter in which to file maps of the roads with government officers, and making no provision for further notice of withdrawal.

§ 523. *The second class*, comprising the great body of the land-grant laws, covering nearly ten years of active legislation of this character, has no distinctive recital of requirements respecting either the survey of its lines, the filing of maps, or orders of withdrawal; the words being of present grant, taking effect when the lines or routes are definitely fixed.

§ 524. *The third class* includes the Union Pacific grants, requiring withdrawals in excess of the quantity granted to be made upon a preliminary map of general route, and taking effect upon definite location; upon which maps of general route, as before observed, only a portion of the prescribed withdrawals were in fact made, for reasons which, at this date, I am unable to explain.

§ 525. *The fourth class*, embracing the Northern Pacific, Atlantic and Pacific, and Southern Pacific, comprises grants protected by legislative withdrawal within stated limits, from the fixing of the general route until vested by the filing of the plat of definite location required by the acts.

§ 526. *The fifth class* embraces grants couched in terms to take effect upon definite location of the lines, but in which requirement is made for executive withdrawal, "as soon as maps showing such location are filed with the secretary of the interior."

§ 527. *Grant to California and Oregon Railroad.*—The grant to the California and Oregon Railroad Company was made on the twenty-fifth of July, 1866, and by the sixth section of said act the company was required to complete the whole road on or before the first day of July, 1875. This section was amended by act of June 25, 1868 (15 Stat. 80), which extended the time for the completion of said road to July 1, 1880. The eighth section of the act of July 25, 1866, provides that if the road is not completed within the time limited, the act shall be null and

void, and all the lands not conveyed by patent to said company at the date of such failure shall revert to the United States. Commissioner McFarland, in a letter dated December 15, 1881, says that this provision of the law is plain, and not to be misunderstood, and says: "I must decline to instruct the local offices at Marysville, California, to accept the fees and certify the lists of lands referred to, as they can not now be patented to the Central Pacific Railroad Company, successor to the California and Oregon Railroad Company, by reason of its failure to complete its road within the time specified in the granting act." By the act of 1862 Congress conferred the same powers upon the Central Pacific which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the act it is provided that:

§ 528. *Grant to Central Pacific Railroad.*—"The Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, is hereby authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, *upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.*"

§ 529. *Present Condition of the Land Grant to the Texas Pacific Railroad Company.*—"The Texas Pacific Railroad Company is required by act of March 3, 1871 (16 Stat. 573), to file a map of its general route with the secretary of the interior, within two years, and the secretary of the interior is directed to cause a withdrawal of the lands within forty miles on each side of the designated road immediately thereafter; the grant, like others, becoming definite "at the time the line of said road is definitely fixed."

The map of general route was filed within the two years, and the land withdrawn as the statute directed, which withdrawal has continued in force up to the present time.

The act contains a proviso (section 12 of the act) that the provisions of the pre-emption and homestead acts "shall be and the same are thereby extended to all other lands of the United States on the line of said railroad when surveyed, except those hereby granted to said company."

By section 5 of the supplement act approved May 2, 1872 (17

Stats. 58), the time for the completion of the road is extended to ten years from the date of the last act, and requires the company to construct and complete the whole line from Marshall, in the state of Texas, to San Diego, in the state of California, within that time.

The section also requires one hundred consecutive miles of the road west from Marshall to be complete and in running order within two years after the date of the act, and that the company thereafter continue to construct not less than one hundred miles of the road yearly until completion.

The section also requires that the company shall commence the construction of the road eastward from San Diego within one year from the passage of the act, and construct not less than ten miles before the expiration of the second year, and after the second year not less than twenty-five miles per annum, in continuous line thereafter between San Diego and the Colorado river, until the junction is formed with the line from the east at the latter point, *or east thereof*.

The company did not comply strictly with any of the requirements of section 5. They did, however, build a road from Marshall westward through the state of Texas, but there is a provision in the bill admitting Texas into the Union, to the effect that all public lands within the boundaries of that state should continue to remain the property of the state, and not become a part of the public domain of the United States. The company, therefore, took no land in that state by virtue of the grant. Section 4 of the original act reads as follows:

“The said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties with, any railroad company or companies heretofore chartered by congressional, state, or territorial authority, on the route prescribed in the first section of this act, but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.”

The Southern Pacific Railroad Company of California not only completed their road to Yuma on the Colorado river, but also (after complying with the railroad laws of the two territories) built a road entirely across the territories of Arizona and New Mexico to El Paso in the state of Texas, and the line of their road as described in the incorporation papers under territorial law is like that described in the congressional law incorporating the Texas Pacific; that is to say, the road was

to be constructed as near as practicable on the thirty-second parallel of north latitude. On this state of facts a suit was instituted by the Texas Pacific Company against the Southern Pacific Railroad Company of California in the United States district court for New Mexico. An injunction was issued against the Southern Pacific, and a receiver appointed by the court. At the hearing of the cause at Santa Fé, in June, 1881, the Southern Pacific claimed that the Texas Pacific had forfeited their rights under the congressional grant by failure to build their road.

The Texas Pacific, by resolution of the board of directors in the city of New York, fixed the definite line of their road and described it as being coincident with the constructed line of the Southern Pacific across the two territories of New Mexico and Arizona, and they contended at the hearing that under the decision of the supreme court of the United States in the case of *St. Joseph R. R. Co. v. Baldwin*, 13 Otto, 426, there was no forfeiture of their right of way, and that under the decision of the same court in the case of *Schulenberg v. Harriman*, 21 Wall. 44, there was no forfeiture of their land grant.

The latter was decided on the ground that a failure to build the road was a *condition subsequent*, of which only the government could take advantage, and that until that was done there could be no forfeiture of the grant.

A compromise between the Texas Pacific and Southern Pacific was afterwards effected, and the two roads were consolidated under the provisions of the fourth section of the original act above referred to. One of the features of this compromise was a conveyance by the Texas Pacific of all its land grants in Arizona and New Mexico to the Southern Pacific.

This settlement and consolidation was sanctioned by a decree of the court at Santa Fé, New Mexico, and a like decree at Yuma, Arizona. Thus it will be seen that this extensive grant, which has a reservation eighty miles in width and extends for about six hundred miles across the two territories, is claimed by the Southern Pacific Railroad Company, but up to the present time, although solicited, neither congress nor the land department have sanctioned their claim. If both refuse, doubtless the question will be tested in courts.

In the mean time, under a recent decision of the secretary of the interior, in the case of *Daneri v. Texas Pacific Railroad*

Company, no settler's rights can attach to the land withdrawn as aforesaid in favor of said road.

Copp's L. O., June 15, 1883.

§ 530. *Definite Line.*—In regard to fixing the definite line of railroads, Secretary Schurz holds, that when the route of a proposed land-grant road has been definitely fixed, and a map of the location filed in the proper land offices, and the limits of the grant have been laid down thereon, the grant previously afloat acquires precision and attaches to particular land so as to vest a title thereto in the grantee; and the deflection of the line of construction from such located line will not have the effect to draw the grant from the original line of definite location.

That when a map of constructed road shows a deviation from the original line of definite location, it becomes a question whether such departure amounts in fact to a new and original location, such as to destroy the identity of the road and bar the right of the grantee to patent to the lands, or whether the substantial identity is preserved, and the deviation amounts to nothing more than a mere correction of the line for construction purposes and to obviate great practical difficulties.

Copp's L. O., vol. 7, p. 26.

This doctrine was affirmed in the case of *Grinnell v. Railroad Company*, 13 Otto, 739, in which case it was held that where the lands are not situated within twenty miles of the relocated line, still the title to them vests in the company.

In the case of *Van Wick v. Knevals*, the supreme court of the United States, in considering the effect of a grant of land by congress to the St. Joseph and Denver railroad, hold that the same is a grant *in præsentia*, except as to the reservations contained in the act itself, to wit: "That if it appear when the route of the road is definitely fixed that the United States have sold any section or a part thereof, or the right of pre-emption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, then other lands shall be selected," etc.; that the route of the road was definitely fixed within the meaning of the act when the company filed with the secretary of the interior a map of its lines, approved by its directors, designating the route of the proposed road; and when the route is thus established, the grant takes effect upon the sections by relation as of the date of the act of congress. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes

the title as fully as though the sections had there been capable of identification.

§ 531. *Rights of Way for Railroads.*—The leading case upon the question of rights of way granted by congress to railroads is that of *Railroad Company v. Baldwin*, 13 Otto, 420, in which the court holds, substantially, that where a grant of a right of way contains no reservations or exceptions it is a present absolute grant, subject to no conditions except such as are necessarily implied; such as that the road shall be constructed and used for the purposes designed, a violation of which can be taken advantage of only by the government.

The route of a railroad must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company; and when a route is adopted by a company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established; it is, in the language of the acts, "definitely fixed."

Van Wick v. Knevals, 106 U. S. 360.

The act of congress approved March 3, 1875, granting to railroads the right of way through public lands, is general in character, and Secretary Schurz holds that it was never intended to provide new, different, or enlarged rights of way for roads already located and subsidized by grants of public lands, nor to apply in any sense whatever to land-grant roads on the public domain.

Copp's L. L. 823.

But this doctrine was overruled or modified by Mr. Justice Cooley in the case of *Flint et al. Railway Co. v. Gordon*. In this case the court held that although as a general rule a homestead patent had relation back to the date of entry, yet it can never be applied so as to make wrong that which was innocent when done, or so as to divest rights which by the sanction of law have been acquired since the time from which the relation dates.

§ 532. *Forfeiture.*—Where there are conditions precedent in a grant, no title vests until the grantee has complied with such conditions.

Farnsworth et al. v. Minnesota and Pacific R. R. Co., 92 U. S. 49.

In such cases, where the condition precedent is not performed within the time provided, no act or declaration of forfeiture is necessary, and no subsequent performance can avail.

Insurance Co. v. Mowry, 6 Otto, 544.

§ 533. But where conditions *subsequent* have not been performed, some legislative or judicial declaration of forfeiture is necessary, and a legislative act directing the possession and appropriation of the land is equivalent to office found.

McKibbin v. United States, 7 Otto, 204; 5 Wall. 213.

And in such cases a published notice by the land department of the restoration of the land to market is necessary to open the land to pre-emption and homestead claimants.

Eldridge v. Sexton, 19 Wall. 189.

A breach of condition subsequent can be taken advantage of only by the government of the United States, and a road built after the time fixed by the granting act for the completion of the whole line, but before declaration of forfeiture, is entitled to its land grant.

Grinnell v. Railroad Co., 13 Otto, 739; Opinion of Attorney General Devens, Copp's L. L., p. 809; Railway v. Alling, 9 Otto, 463; Railroad Co. v. Baldwin, 13 Id. 426.

It is only when covenants are mutual and dependent, or where their performance is made an express condition, that a breach of them involves an avoidance of the contract.

Emigrant Co. v. County of Adams, 10 Otto, 61.

The leading case upon the question of forfeiture of land grants made by congress to railroad companies is that of *Schulenberg v. Harriman*, 21 Wall.

In this case there was a grant of lands to the state of Wisconsin to aid in the construction of a certain railroad within that state. The language of the first section of the act was, "That there be and hereby is granted to the state of Wisconsin" the lands specified.

The grant also contained a condition that if the road be not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States. The road was not completed within the time required for its construction, which had not been extended, and congress had passed no act, nor had judicial proceedings been instituted, to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. The failure on the part of the company was total, absolute. Upon this state of facts, it was held that the grants to the state of Wisconsin were grants *in præsenti*, which acquired precision as the route of the road became fixed by its location; and that the lands had not reverted to the United States although the road was not constructed within the period

prescribed, no action having been taken either by legislative or judicial proceedings to enforce a forfeiture of the grant..

§ 534. *Settlers' Rights.*—The general rule of law with reference to the rights of settlers on public lands which have been or may be withdrawn from market in consequence of proposed railroads is, that where the settler settled on the land prior to such withdrawal he can perfect his title if he has complied with all the requirements of the law with reference thereto.

R. S. 2281.

The first section of the act of congress approved April 21, 1876, provides, "that all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers upon tracts of land of not more than one hundred and sixty acres each within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

In construing this section, Secretary Schurz, after reviewing the legislative history of the act and the debates in congress in reference thereto, uses the following language: "There can be no doubt that it was the intention of congress to afford relief to persons who had settled on this class of lands *after* filing the maps of definite location *but before notice of withdrawal was received at the local office.* The words "public lands" presupposed that the lands are public for the purpose of the act, and the words "pre-emption and homestead entries," in the special sense in which they are used, refer to settlements made in good faith by persons possessing the requisite legal qualifications with a view of entering the lands under the provisions of the pre-emption and homestead laws whenever they were surveyed and came regularly into market."

Opinion of the Secretary, Copp's L. L., vol. 2, p. 833.

If the act above referred to is constitutional, then it is the law of all railroad land grants made prior to its passage, and of all made since its passage, unless there is a legislative withdrawal of

the land in the act itself, or something equivalent to a withdrawal.

The land department holds that this act is mandatory, and that where a settler has complied with all the requirements of the law he is entitled to a patent even though a patent has previously issued to the railroad company, thus leaving the question with the courts.

Copp's L. O., vol. 7, p. 181.

Secretary Teller also holds that a settlement and filing constitute an entry under the act, and that the language "at a time subsequent to the expiration of such grant" has reference to the dates named in the various granting acts to railroads, as the dates at which the roads should be completed, and not to a time when, by legislative or judicial action, a forfeiture might be declared.

Copp's L. O., Dec. 1882.

And Acting Secretary Joselyn holds, under the facts stated in the opinion, that although a pre-emptor settled upon a tract subsequently to the definite location of the railroad opposite the same, and although he failed to file his declaratory statement within the prescribed time, the remedy conferred by the third section of the act of April 21, 1876, cures the technical defects in his case.

Copp's L. O., Dec. 1882.

§ 535. *Grants in Præsentis*.—All the transcontinental railroad grants are grants *in præsentis*—that is to say, present grants; and as against all parties but settlers when the lands are transferred to the companies by the government, such transfer has relation back to the date of the act, and vests the title as of that date.

In regard to the right of a state to tax the land within the limits of a railroad grant, see *Railway Co. v. McShane*, 22 Wall. 461; *Central P. R. R. Co. v. Howard*, 52 Cal. 227.

Contests with Settlers.—When at the time the railroad attached, the granted land *prima facie* belonged to the road, the burden of proving that the same was excepted from the grant is upon him who affirms the existence of a valid pre-emption or homestead claim thereto at the date the grant took effect. He must show that the pre-emptor not only initiated a prior valid settlement, but that he possessed all the required personal qualifications.

A filing of record is *prima facie* evidence of a valid right as against the railroad, and to secure the tract, proper evidence

must be furnished by the company to show that the pre-emption claim was abandoned or invalid at the time the right of the road attached.

Copp's L. L., vol. 2, pp. 732, 897.

Certification.—Certification is the last act of the government in transferring lands to states and railroad companies.

As to the effects of certification where there was a land grant to a state for railroad purposes, see Copp's L. L., p. 804; and as to the effect where there has been a certification of school lands to a state, see *Id.*, p. 962; 1 Otto, 130.

Mortgage.—A mortgage of railroad lands is such a sale as to prevent forfeiture of the lands if the road is not built within the time limited.

Overlapping Grants.—Where grants of land are made by the same act of congress to two different railroad companies, and afterwards the grants are found to overlap, the land falling within the overlapping limits inures to them jointly; in other words, they are tenants in common of such land.

Indian Territory.—As to the right of the Atlantic and Pacific Railroad Company to lands in Indian Territory, see Commissioner's Letter, Copp's L. L., p. 764. As to the right of the Northern Pacific Railroad Company to Indian lands, see *Id.*, p. 964.

Practice.—After patent has issued, a party may obtain relief in a court of chancery, if he has such an equitable right as will estop the patentee, or those claiming under him, from asserting the legal title to the land; otherwise such party must apply to the officers of the government, who, although not clothed with the power to set the patent aside, may, for that purpose, bring suit in the name of the United States.

Steel v. Smelting Co., 106 U. S. 447.

CHAPTER XXXI.

RULES OF PRACTICE.

§ 536. Rules of practice in cases before the United States district land offices, the general land office, and the department of the interior, approved December 20, 1880.

DEPARTMENT OF THE INTERIOR, }
GENERAL LAND OFFICE, }
WASHINGTON, D. C., Nov. 26, 1880. }

Sir: In compliance with your direction of the twenty-second of September last, I have the honor to submit herewith, for your consideration and approval, a revised draft of the rules of practice in cases before the district land officers, the general land office, and department of the interior, embracing such modifications and additional rules as the experience of this office has suggested for the good of the practice and the public service; the whole being arranged in a new form by topics, and the consecutive numbering of paragraphs, with a view to greater clearness and convenience.

I am, sir, very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner*.

HON. C. SCHURZ, *Secretary of the Interior*.

DEPARTMENT OF THE INTERIOR, }
WASHINGTON, Dec. 20, 1880. }

Sir: I herewith return with my approval the draft of the revised rules of practice in land cases, received with your letter of November 26, 1880. Very respectfully,

C. SCHURZ, *Secretary*.

To the Commissioner of the General Land Office.

RULES OF PRACTICE.

PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

I. CONTESTS AND HEARINGS.

1.—INITIATION OF CONTEST.

§ 537. *Rule 1.*—Contests may be initiated by a party in interest, or by any other person, in the following cases:

1. Alleged abandoned homestead entries.

R. S. 2297.

2. Alleged abandoned or forfeited timber-culture entries.

20 Stat. 113, sec. 3.

Rule 2.—In all other cases contests can be initiated only by a party in interest.

Rule 3.—In every case of application for a hearing, an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

Rule 4.—Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2.—HEARINGS IN CONTESTED CASES.

Rule 5.—Registers and receivers may order hearings in the following cases wherein entry has not been perfected, and no certificate has been issued as a basis for patent, namely:

1. Contests between pre-emption claimants.
2. Contests between homestead and pre-emption claimants.
3. Contests to clear the record of abandoned homestead entries.
4. Contests to clear the record of abandoned or forfeited timber-culture lands.

Rule 6.—In cases of an entry or location of record, on which final certificate has been issued, the hearing will be ordered only by direction of the commissioner of the general land office.

Rule 7.—Applications for hearings under the preceding section must be transmitted by the register and receiver, with special report and recommendation, to the commissioner for his determination and instructions.

3.—NOTICE OF CONTESTS.

Rule 8.—At least thirty days' notice shall be given of all hearings before the register and receiver, unless, by written consent, an earlier shall be agreed upon.

Rule 9.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the range and range number of the entry,

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and the land office where and the date when made, and the name of the party making the same.

6. It must give the name of the contestant, and briefly state the grounds and purpose of the contest.

7. It may contain any other information pertinent to the contest.

4.—SERVICE OF NOTICE.

Rule 10.—Personal service shall be made in all cases when possible, if the party to be served is resident in the state or territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served.

Rule 11.—Personal service may be executed by any officer or person.

Rule 12.—Notice may be given by publication alone, only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that personal service can not be made.

5.—NOTICE BY PUBLICATION.

Rule 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks, in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the newspaper published in the county nearest to such land.

Rule 14.—Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified, and a like copy shall be posted in a conspicuous place on the land during the period of publication, for at least two weeks prior to the day set for hearing.

6.—PROOF OF SERVICE OF NOTICE.

Rule 15.—Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

Rule 16.—When service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

7.—NOTICE OF INTERLOCUTORY PROCEEDINGS.

Rule 17.—Notice of interlocutory motions, proceedings, or-

ders, and decisions shall be in writing, and may be served personally or by registered letter through the mail.

Rule 18.—Proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter.

8.—REHEARINGS.

Rule 19.—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—CONTINUANCES.

Rule 20.—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing:

1. That one or more of the witnesses in his behalf is absent, without his procurement or consent.
2. The name and residence of each witness.
3. The facts to which they would testify if present.
4. The materiality of the evidence.
5. The exercise of proper diligence to procure the attendance of the absent witnesses; and,
6. That affiant believes that said witnesses can be had at the time to which it is sought to have the trial postponed.

Rule 21.—One continuance only shall be allowed to either party on account of absent witnesses, unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

Rule 22.—No continuance shall be granted when the opposite party shall admit that the witnesses would if present testify to the statement set out in the application for continuance.

10.—DEPOSITIONS.

Rule 23.—Testimony may be taken by deposition in the following cases?

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.
2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usual traveled route.
3. Where the witness resides out of or is about to leave the state or territory, or is absent therefrom.
4. Where, from any cause, it is apprehended that the witness

may be unable or will refuse to attend; in which case the deposition will be used only in event that the personal attendance of the witness can not be obtained.

Rule 24.—The party desiring to take a deposition under rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party, or his attorney.

Rule 25.—The opposing party will be allowed ten days in which to file cross-interrogatories.

Rule 26.—After the expiration of the ten days allowed for filing cross-interrogatories, a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

Rule 27.—The register and receiver may designate any officer authorized to administer oaths within the county or district where the witness resides to take such deposition.

Rule 28.—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out, and the answers thereto to be inserted immediately underneath the respective questions; and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner.

Rule 29.—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

Rule 30.—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

Rule 31.—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land officers.

Rule 32.—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

Rule 33.—The parties in any case may stipulate in writing to take depositions before qualified officer, and in any manner.

Rule 34.—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

Rule 35 (as amended).—1. In contested cases and hearings ordered by the commissioner of the general land office, testimony may be taken near the land in controversy, before the United States commissioner or other officer authorized to administer oaths, at a time and place to be fixed by the register and receiver and stated in notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers.

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof by the local office noted on the papers in the same manner as provided in case of depositions by rules 29 to 32 inclusive.

4. On the day set for hearing at the local office, the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves.

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under rules 54 to 58 inclusive.

7. The costs of transcribing cross-examinations will in all cases be taxed to the party making the cross-examination.

8. When hearings are ordered by the commissioner of the general land office, in cases to which the United States is a party, continuances will be granted in accordance with the general practice in the United States cases in the courts, without requiring an affidavit on the part of the government.

9. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under rule 27, can not act on the day fixed for taking the testimony or deposition, as the case may be, the testimony or deposition will be deemed properly taken before any other qualified officer at the same place and time, who may be authorized by the officer

originally designated, or by agreement of parties to act in the place of the officer first named.

11.—TRIALS.

Rule 36.—Upon the trial of a cause the register and receiver may, in any case, and should in all cases where necessary, personally direct the examination of witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

Rule 37.—The register and receiver will be careful to reach, if possible, the exact condition and *status* of the land involved in any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

Rule 38.—In pre-emption cases they will particularly ascertain the nature, extent, and value of alleged improvements, by whom made, and when; the true date of the settlement of persons claiming as pre-emptors; the steps taken to mark and secure the claim, and the exact *status* of the land at that date, as shown upon the records of their office.

Rule 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

Rule 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

Rule 41.—No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered, the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the commissioner.

Rule 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

12.—APPEALS.

Rule 43.—Appeals from the action or decisions of registers and receivers lie in every case to the commissioner of the general land office.

R. S. 453, 2478.

Rule 44.—After hearing in a contested case has been had and closed, the register and receiver will notify the parties in in-

terest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from their decision to the commissioner.

Rule 45.—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

Rule 46.—No appeal from the action or decisions of the register and receiver will be received at the general land office unless forwarded through the local officers.

Rule 47.—A failure to appeal from the decision of the local officers will be considered final as to the facts in the case, and will be disturbed by the commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In event of disagreeing decisions by the local officers.
4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

Rule 48.—In any of the foregoing cases the commissioner will reverse or modify the decision of the local officers or remand the case, at his discretion.

Rule 49.—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver; but access to the same under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest, or their attorneys, under the supervision of those officers.

13.—REPORTS AND OPINIONS.

Rule 50.—Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific references to the postings and annotations upon their records.

Rule 51.—In order that all parties to a contest may have full opportunity to examine the record and prepare their arguments upon the questions at issue, the reports of the register and receiver in such cases will not be forwarded until the expiration of the thirty days named in the notice for appeal, unless all parties request its earlier transmission.

Rule 52.—The register and receiver will forward their report, together with the testimony and all the papers in the case, to the commissioner of the general land office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

Rule 53.—The local officers will thereafter take no further action affecting the disposal of the land in contest, until instructed by the commissioner.

14.—TAXATION OF COSTS.

Rule 54.—Applicants for contest must deposit with the register and receiver a sufficient sum of money to defray the cost of the proceedings.

Rule 55.—Registers and receivers are not required to make advances from their own funds, nor to incur individual liabilities for the expense of hearings.

Rule 56.—When testimony is taken by deposition the party in whose behalf the same is taken must pay the costs thereof.

Rule 57.—Parties contesting the validity of homestead and timber-culture entries must pay the costs of the contest.

Rule 58.—In other contested cases the costs may be equitably apportioned between the parties by the register and receiver.

Rule 59.—Only the actual costs of notice and the legal fees for reducing testimony to writing, or for acting on mineral-land applications and protests, can be charged to the parties.

R. S. 2238.

Rule 60.—Costs of notice will include the costs of all notices up to the final determination of the case.

Rule 61.—Upon the final disposal of a case, any excess in the sum deposited as security over the amount chargeable to the party making the deposit will be returned to him by the register and receiver.

Rule 62.—When hearings are ordered by the commissioner, or by the secretary of the interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

Rule 63.—The preliminary costs provided for by the preceding section will be collected by the register and receiver, where the parties are brought before them in obedience to the order of hearing.

Rule 64.—The register and receiver will then require proper

provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

Rule 65.—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

II. APPEALS FROM DECISIONS REJECTING APPLICATIONS TO ENTER PUBLIC LANDS.

Rule 66.—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands, the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented, and their reasons for rejecting it.

2. They will promptly advise the party in interest of their action, and of his right of appeal to the commissioner.

3. They will note upon their records a memorandum of the transaction.

Rule 67.—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office.

Rule 68.—The register and receiver will promptly forward the appeal to the general land office, together with a full report upon the case.

Rule 69.—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with reasons for the rejection.

2. A description of the tract involved and a statement of its *status*, as shown by the records of the local land office.

3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract, and to the proceedings had.

Rule 70.—Rules 43 to 48, inclusive, are applicable to all appeals from the decisions of register and receiver.

PROCEEDINGS BEFORE SURVEYORS GENERAL.

Rule 71.—The proceedings in hearings and contests before surveyors general shall, as to notices, depositions, and other matters, be governed, as nearly as may be, by the rules pre-

scribed for proceedings before registers and receivers, unless otherwise provided by law.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND
OFFICE AND SECRETARY OF THE INTERIOR.

Rule 72.—When a contest has been closed before the local land officers, and their report forwarded to the general land office, no additional evidence will be admitted in the case unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial, or in support of a mineral application or protest; but this rule will not prevent the commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

Rule 73.—After the commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

Rule 74.—When a case is pending on appeal from the decision of the register and receiver or surveyor general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained, except upon written stipulation duly filed, or good cause shown to the commissioner.

Rule 75.—If before decision by the commissioner either party should desire to discuss a case orally, reasonable opportunity therefor will be given, in the discretion of the commissioner, but only at a time to be fixed by him, upon notice to the opposing counsel, stating time and specific points upon which discussion is desired; and except as herein provided, no oral hearings or suggestions will be allowed.

REHEARINGS AND REVIEWS.

Rule 76.—Motions for rehearings before registers and receivers, or for review or reconsideration of the decisions of the commissioner or secretary, will be allowed in accordance with legal principles applicable to motions for new trials at law, after due notice to opposing party.

Rule 77.—Motions for rehearings and reviews must be filed

in the office wherein the decision to be affected by such rehearing or review was made, or in the local land office, for transmittal to the general land office, and except when based upon newly discovered evidence, must be filed within thirty days from notice of such decision.

Rule 78.—Motions for rehearings and reviews must be accompanied by an affidavit of the party or his attorney that the motion is made in good faith, and not for the purpose of delay.

Rule 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

Rule 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

APPEAL FROM THE COMMISSIONER TO THE SECRETARY.

Rule 81.—An appeal may be taken from the decision of the commissioner of the general land office to the secretary of the interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions, and orders for hearing, or other matter resting in the discretion of the commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the secretary, on review, in case an appeal upon the merits be finally allowed.

Rule 82.—When the commissioner considers an appeal defective, he will notify the party of the defect; and if not amended within fifteen days from the date of the service of such notice, the appeal will be dismissed and the case closed.

Rule 83.—In proceedings before the commissioner, in which he shall formally decide that a party has no right of appeal to the secretary, the party against whom such decision is rendered may apply to the secretary for an order directing the commissioner to certify said proceedings to the secretary, and to suspend further action until the secretary shall pass upon the same.

Rule 84.—Applications to the secretary under the preceding rule, shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

Rule 85.—When the commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered

to apply to the secretary for an order in accordance with rules 83 and 84.

Rule 86.—Notice of an appeal from the commissioner's decision must be filed in the general land office, and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

Rule 87.—When notice of the decision is given through the mails by the register and receiver, or surveyor general, five days additional will be allowed by those officers for the transmission of the letter, and five days for the return of the appeal through the same channel, before reporting to the general land office.

Rule 88.—Within the time allowed for giving notice of appeal, the appellant shall also file in the general land office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

Rule 89.—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

Rule 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

Rule 91.—The appellee shall be allowed thirty days from the expiration of the sixty days allowed for appeal in which to file his argument.

Rule 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply; and no other or further arguments or motions of any kind shall be filed without permission of the commissioner or secretary and notice to the opposite party.

Rule 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same.

Rule 94.—Such service shall be made personally or by registered letter.

Rule 95.—Proof of personal service shall be the written acknowledgment of the party served, or the affidavit of the person making the service, attached to the papers served, and stating time, place, and manner of service.

Rule 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter attached to a copy of the post-office receipt.

Rule 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail,

except in case of notice to resident attorneys, when one day will be allowed.

Rule 98.—Notice of interlocutory motions and proceedings before the commissioner and secretary shall be served personally or by registered letter, and service proved as provided in rules 94 and 95.

Rule 99.—No motion affecting the merits of a case or the regular order of proceedings will be entertained, except on due proof of service of notice.

Rule 100.—*Ex parte* cases, and cases in which the adverse party does not appear, will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

Rule 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings, who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address, and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice, unless within fifteen days after being requested to file such statement he shall comply with said requirement.

Rule 102.—No person, not a party to the record, shall intervene in a case without first disclosing on oath the nature of his interest.

Rule 103.—When the commissioner makes an order or decision affecting the merits of a case, or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known.

ATTORNEYS.

Rule 104.—In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

Rule 105.—All notices will be served upon the attorneys of record.

Rule 106.—Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him; and notice to the attorney will be deemed notice to the party in interest.

Rule 107.—All attorneys practicing before the general land office and department of the interior must first file the oath of office prescribed by section 3478, United States revised statutes.

Rule 108.—In the examination of any case, whether contested or *ex parte*, and for the preparation of arguments, the attorneys employed, when in good standing in the department, will be allowed full opportunity to consult the record of the case and to examine the abstracts, plats, field-notes, and tract books, and the correspondence of the general land office, or of the department, relative thereto, and to make verbal inquiries of the various chiefs of divisions at their respective desks in respect to the papers or *status* of said case; but such personal inquiries will be made of no other clerk in the division except in the presence or with the consent of the head thereof, and will be restricted to the hours between 11 A. M. and 2 P. M.

Rule 109.—Any attorney detected in any abuse of the above privileges, or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the department.

Rule 110.—Should either party desire to discuss a case orally before the secretary, opportunity will be afforded at the discretion of the department, but only at a time specified by the secretary, or fixed by stipulation of the parties with the consent of the secretary; and in the absence of such stipulation, on written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

Rule 111.—The examination of cases on appeal to the commissioner or secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

DECISIONS.

Rule 112.—Decisions of the commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

R. S. 2273.

Rule 113.—The decision of the secretary, so far as respects the action of the executive, is final.

Rule 114.—The preceding rules shall take effect on the first day of February, 1881.

None of the foregoing rules shall be construed to deprive the secretary of the interior of the exercise of the directory and supervisory powers conferred on him by law.

CHAPTER XXXII.

MINING CLAIMS BEFORE LAND OFFICES.

- § 538. Manner of Location.
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§ 538. *Manner of Location.*—From and after the tenth of May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of fifteen hundred linear feet, along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of fifteen hundred feet; but in no event can a location of a vein or lode made subsequently to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

§ 539. *Side and End Lines.*—With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the revised statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth of May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on either side of the middle of the vein at the surface, or such distance as is allowed by local laws; for example, four hundred feet can not be taken on one side and two hundred feet on the other. If, however, three hundred feet on each side are allowed, and by reason of prior claims but one hundred feet can

be taken on one side, the locator will not be restricted to less than three hundred feet on the other side; and when the locator does not determine by exploration where the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

§ 540. *Local Rules and Regulations.*—By the foregoing it will be perceived that no lode claim located after the tenth of May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the tenth day of May, 1872, render such lateral limitation necessary.

§ 541. *Notice of Location.*—It is provided by the revised statutes that the miners of each district may make rules and regulations, not in conflict with the laws of the United States, or of the state or territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.

§ 542. *Recordation of Notice.*—The statutes provide that no lode claim shall be recorded until after the discovery of a vein or lode within the limits of the ground claimed; the object of which provision is evidently to prevent the incumbering of the district mining records with useless locations before sufficient work has been done thereon to determine whether a vein or lode has really been discovered or not. This provision has given rise to very important litigation, which is considered under the title, "Mining Laws in Courts."

§ 543. *Work on Claim before Recordation of Notice.*—The claimant should, therefore, prior to recording his claim, unless

the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface; and should give the course and distance, as nearly as practicable, from the discovery shaft on the claim to some permanent point or objects—such, for instance, as stone monuments, blazed trees, the confluence of streams, points of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim, and render it susceptible of identification from the description thereof given in the record of locations in the district.

§ 544. *Boundaries and Monuments.*—In addition to the foregoing data, the claimant should state the names of adjoining claims, or if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of the surface ground; and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

§ 545. *Certificate of Location.*—Within a reasonable time, say twenty days, after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

§ 546. *Annual Labor.*—In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon, within one year from the date of such location, and annually thereafter; in default of which, the claim will be subject to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, as

signs, or legal representatives, have resumed work thereon after such failure and before such relocation.

§ 547. *The Expenditure may be Made on Tunnel.*—The expenditures required upon mining claims may be made from the surface or in running a tunnel for the development of such claims; the act of February 11, 1875, providing that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

§ 548. *Importance of Foregoing Rules.*—The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

§ 549. *Tunnel Rights.*—Section 2323, revised statutes, provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel or veins or lodes, not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

§ 550. *Rights of Tunnel Locators.*—The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the line thereof and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

§ 551. *Construction of Term "Face."*—The term "face," as

used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

§ 552. *Written Notice to be Posted and Boundary Lines Marked.*—To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location, by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right, the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth, applicable to locations of veins or lodes; and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

§ 553. *Notice and Affidavit to be Recorded.*—At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be.

§ 554. *To be Recorded.*—This notice of location must be duly

recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

- By a compliance with the foregoing, much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

§ 555. *Forfeitures.*—The land office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels, to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statute; and a reasonable diligence on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the lines of such tunnel.

§ 556. *Manner of Proceeding to Obtain Government Title to Vein or Lode Claims.*—By section 2325, revised statutes, authority is given for granting titles for mines by patent from the government to any person, association, or corporation having the necessary qualifications as to citizenship, and holding the right of possession to a claim in compliance with law.

§ 556 a. *Surveys, Manner of Making.*—The claimant is required, in the first place, to have a correct survey of his claim made, under authority of the surveyor general of the state or territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field-notes in each case will be prepared by the surveyor general: one plat and the original field-notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field-notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office; and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference.

§ 557. *Survey and Notice to be Posted on Claim.*—The claimant is then required to post a copy of the plat of such survey in a

conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting; the name of the claimant; the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and if so, where the record may be found; the number of feet claimed along the vein, and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes, or if none adjoin, the names of the nearest claims, etc.

§ 558. *Copy of Notice, Affidavit, and Field-notes to be Filed with Register and Receiver.*—After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat, and the field-notes of the survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the notice so posted to be attached to and form a part of said affidavit.

§ 559. *Affidavit or Sworn Statement.*—Attached to the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of congress; such sworn statement to relate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

§ 560. *Abstract of Title.*—This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz.: where he claims to be a locator, a full, true, and correct copy of such location should be furnished as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims as a locator in company with others, who have since conveyed their interests in the lode to him, a copy of the original record of location should be filed, together with an abstract of title from the proper recorder, under seal or oath, as aforesaid, tracing the co-locator's possessory rights in the claim to such applicant for

patent. Where the applicant claims only as a purchaser for valuable consideration, a copy of the location record must be filed, under seal, or upon oath, as aforesaid, with an abstract of title certified as above by the proper recorder, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant.

§ 561. *Lost Records.*—In the event of the mining records in any case having been destroyed by fire, or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

§ 562. *Proceedings where Records are Lost.*—Upon the receipt of these papers, the register will, at the expense of the claimant (who must produce the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application, for the period of sixty days, in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. In all cases sixty days must intervene between the first and the last insertion of the notice in such newspaper. When the notice is published in a weekly newspaper, ten consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for the required period.

§ 563. *Same.*—The notices so published and posted must be as full and complete as possible, and embrace all the data given in the notice posted upon the claim.

§ 564. *Same.*—Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

§ 565. *Certificate of Surveyor General of \$500 Worth of Work.*—The claimant, either at the time of filing these papers with the register or at any time during the sixty days publication, is required to file a certificate of the surveyor general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnished such an accurate

description of the claim as will, if incorporated into a patent, serve to fully identify the premises; and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

It will be the more convenient way to have this certificate indorsed by the surveyor general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

§ 566. *Proof of Posting*.—After the sixty days' period of newspaper publication has expired, the claimant will file his affidavit, showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days publication, giving the dates.

§ 567. *Payment*.—Upon the filing of this affidavit, the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field-notes of the survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office; after which the whole matter will be forwarded to the commissioner of the general land office, and a patent issued thereon if found regular.

In sending up the papers in the case, the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days; such certificate to state distinctly when such posting was done, and how long continued.

The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims.

§ 568. *Other Duties of Surveyors General*.—The surveyor general must continue to designate all surveyed mineral claims, as heretofore, by a progressive series of numbers, beginning with lot No. 37 in each township; the claim to be so designated at date of filing the plat, field-notes, etc., in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a remote distance

from such public corner, in which latter case, the reference by course and distance to permanent objects in the neighborhood will be a sufficient designation by which to fix the *locus* until the public surveys shall have been closed upon its boundaries.

§ 569. *Adverse Claims.*—Section 2326, revised statutes, provides for adverse claims, fixes the time within which they shall be filed to have legal effect, and prescribes the manner of their adjustment. Said section requires that the adverse claim shall be filed during the period of publication of notice; that it must be on the oath of the adverse claimant; and that it must show the “nature,” the “boundaries,” and the “extent” of the adverse claim. In order that this section of law may be properly carried into effect, the following is communicated for the information of all concerned:

§ 570. *When to be Filed.*—An adverse mining claim must be filed with the register of the same land office with whom the application for patent was filed, or in his absence, with the receiver, and within the sixty days’ period of newspaper publication of notice.

§ 571. *What to Contain.*—The adverse notice and claim must be duly sworn to by the person or persons making the same before an officer authorized to administer oaths within the land district, or before the register or receiver; it will fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration, or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a mere verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses if any were present at the time, and if he claims as a locator, he must file a duly certified copy of the location from the office of the proper recorder.

§ 572. *Filing of Plat of Claim.*—In order that the “boundaries” and “extent” of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition, there must be attached to such plat

of survey a certificate or sworn statement by the surveyor as to the approximate value of labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party such improvements were made.

§ 573. *Register to Give Notice to Both Parties.*—Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to both parties to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required, within thirty days from the date of such filing, to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent will be allowed to proceed upon its merits.

§ 574. *Proceedings in Land Office Suspended.*—When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

The proceedings after rendition of judgment by the court in such case are so clearly defined by the act itself as to render it unnecessary to enlarge thereon in this place.

§ 575. *Placer Claims.*—The proceedings to obtain patents for claims usually called placers, including all forms of deposit, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, must conform as nearly as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than 20 acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on un-

surveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

§ 576. *Ten-acre Tracts.*—By section 2330, revised statutes, authority is given for the subdivision of 40-acre legal subdivisions into 10-acre lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

It is held, therefore, that under a proper construction of the law these 10-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these 10-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the 40-acre tracts may be subdivided into 10-acre lots, either in the form of squares of ten by ten chains, or of parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what 10-acre lots are sought to be patented, in addition to the other data required in the notice.

§ 577. *Where a Placer Claim Includes a Vein or Lode.*—Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement, and the vein or lode must be surveyed and marked upon the plat; the field-notes and plat giving the area of the lode claim, or claims, and the area of the placer separately. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. It should be remembered that an application which omits to include an application for a known vein or lode therein must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. When there is no known lode or vein, the fact must appear by the affidavit of claimant and one or more witnesses.

When an adverse claim is filed to a placer application, the

proceedings are the same as in the case of vein or lode claims, already described.

§ 578. *Quantity of Placer Ground Subject to Location.*—By section 2330, revised statutes, it is declared that no location of a placer claim made after July 9, 1870, shall exceed 160 acres for any one person, or association of persons, which location shall conform to the United States surveys.

§ 579. *Twenty Acres for Each Individual.*—Section 2331 provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public surveys and the subdivisions of such surveys, and no such locations shall include more than 20 acres for each individual claimant.

The foregoing provisions of law are construed to mean that after the ninth day of July, 1870, no location of a placer claim can be made to exceed 160 acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed 20 acres, and no location made by an association of individuals can exceed 160 acres, which location of 160 acres can not be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than 20 acres, although the locator is not compelled to take so much.

The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations, so far as the same are applicable, the law requiring, however, that where placer claims are upon surveyed public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

§ 580. *Proof in Placer Claims.*—With regard to the proofs necessary to establish the possessory right to a placer claim, section 2332 provides that, "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed

by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

§ 581. *Proof (continued).*—When an applicant desires to make his proof of possessory right in accordance with this provision of law, you will not require him to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will require him to furnish a duly certified copy of the statute of limitations of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application, the area thereof, the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree; and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

§ 582. *Certificate as to Title.*—There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or territory as aforesaid, other than that which has been finally decided in favor of the claimant.

The claimant should support his narrative of facts relative to his possession, occupancy, and improvements, by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case, and are capable of testifying understandingly in the premises.

It will be to the advantage of claimants to make their proofs as full and complete as practicable.

§ 583. *Mill Sites.*—Section 2337 provides that, "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject

to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill site as provided in this section."

§ 584. *Application for Patent.*—To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States revised statutes, or prior laws under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

§ 585. *Manner of Describing.*—In making the survey in a case of this kind, the lode claim should be described in the plat and field-notes as "Lot No. 37 A," and the mill site as "Lot No. 37 B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site, as well as upon the vein or lode, for the statutory period of sixty days. In making the entry, no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being \$5 for each acre and fractional part of an acre embraced by such lode and mill-site claim.

§ 586. *For Mill Site Only.*—In case the owner of a quartz-mill or reduction-works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at the said price per acre. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which

proof may, where the matter is unquestioned, consist of the sworn statement of the claimant, supported by that of one or more disinterested persons, capable from acquaintance with the land to testify understandingly. The law expressly limits mill-site locations made from and after its passage to five acres. The registers and receivers will preserve an unbroken consecutive series of numbers for all mineral entries.

§ 587. *Proof of Citizenship of Corporations.*—The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. The affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

§ 588. *Affidavit as to Citizenship.*—In case of an individual, or an association of individuals who do not appear by their duly authorized agent, the register and receiver will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

In case an applicant has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

The affidavit of citizenship may be taken before the register and receiver, or any other officer authorized to administer oaths within the district.

§ 589. *Hearing to Establish the Character of Lands.*—Section 2335 provides that all affidavits required under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office.

§ 590. *Same.*—Hearings of this character, as practically distinguished, are of two kinds:

1. Where lands which are sought to be entered and patented as agricultural are alleged by affidavit to be mineral, or when sought as mineral, their non-mineral character is alleged. The proceedings relative to this class are in the nature of a contest between two or more known parties, and the testimony may be taken on personal notice of at least ten days, duly served on all parties, or, if they can not be found, then by publication for thirty days in a newspaper of general circulation, to be designated by the register of the land office as published nearest to the land in controversy. If publication is made in a weekly newspaper, the notice must be inserted in five consecutive weekly issues thereof.

2. When lands are returned as mineral by the surveyor general, or are withdrawn as mineral by direction of the general land office, or when such lands are sought to be entered as agricultural, notice must be given by publication for thirty days, as aforesaid, and also by posting in a conspicuous place on each 40-acre subdivision of the land claimed, for the same period.

§ 591. *Notice of Contest as to Character of Land.*—All notices must describe the land, give the name, the address of the claimant, the character of his claim, and the time, place, and purpose of the hearing.

Proof of service of notice, when personal, must consist of either acknowledgment of service indorsed on the citation (which is always desirable), or the affidavit of the party serving the same, giving date, place, and manner of service, indorsed as aforesaid.

Proof of publication must be the affidavit of the publisher of the newspaper, stating the period of publication, giving dates, stating whether in a daily or weekly issue, and a copy of the notice so published must be attached to and form a part of the affidavit.

Proof of posting on the claim must be made by the affidavits of two or more persons who state when and where the notice was posted; that it remained so posted during the prescribed period, giving dates; and a copy of the notice so posted must be attached to and made a part of the affidavits.

Proof of notice is indispensable to the regularity of proceedings, and must accompany the record in every case. The expense of notice must in every case be paid by the parties thereto.

§ 592. *Proof of Notice.*—At the hearing there must be filed the affidavit of the publisher of the paper that the said notice was published for the required time, stating when and for how

long such publication was made, a printed copy thereof to be attached and made a part of the affidavit. In every case where practicable, in addition to the foregoing, personal notice must be served upon the mineral affiants, and upon any parties who may be mining upon or claiming the land.

§ 593. At the hearing, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinabar, lead, tin, or copper, or other valuable deposit which has never been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular 10-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

§ 594. The testimony should also show the agricultural capacities of the land, what kinds of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops, or cereals, or vegetables, and within which particular 10-acre subdivisions such crops are raised; also, which of these subdivisions embrace his improvements, giving in detail the extent and value of his improvements, such as house, barn, vineyard, orchard, fencing, etc.

§ 595. It is thought that *bona fide* settlers upon lands really agricultural will be able to show, by a clear, logical, and succinct chain of evidence, that their claims are founded upon law and justice; while parties who have made little or no permanent agricultural improvements, and who only seek title for speculative purposes, on account of the mineral deposits known to themselves to be contained in the land, will be defeated in their intentions.

§ 596. The testimony should be as full and complete as possible; and, in addition to the leading points indicated above, everything of importance bearing upon the question of the character of the land should be elicited at the hearing.

Where the testimony is taken before an officer who does not

use a seal, other than the register and receiver, the official character of such officer must be attested by a clerk of a court of record, and the testimony transmitted to the register and receiver, who will thereupon examine and forward the same to the general land office, with their joint opinion as to the character of the land as shown by the testimony.

§ 597. *Survey to Set Apart Mineral from Agricultural Land.*—When the case comes before the land office, such an award of the land will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land in any 40-acre tract, the necessary instructions will be issued to enable the agricultural claimant, at his own expense, to have the work done, at his option, either by the United States deputy, county, or other local surveyor; the survey in such case may be executed in such manner as will segregate the portion of land actually containing the mine, and used as surface ground for the convenient working thereof, from the remainder of the tract, which remainder will be patented to the agriculturist to whom the same may have been awarded, subject, however, to the condition that the land may be entered upon by the proprietor of any vein or lode for which a patent has been issued by the United States for the purpose of extracting and removing the ore from the same, where found to penetrate or intersect the land so patented as agricultural, as stipulated by the mining act. Such survey, when executed, must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

§ 598. Upon the filing of the plat and field-notes of such survey, duly sworn to as aforesaid, the same will be transmitted to the surveyor general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to the general land office, to be affixed to the duplicate and triplicate township plats, respectively.

In cases where a portion of a 40-acre tract is awarded to an agricultural claimant, and he causes the segregation thereof from the mineral portion, as aforesaid, such agricultural portion will not be given a numerical designation, as in the case of surveyed mineral claims, but will simply be described as the

"fractional — quarter of the — quarter of section —, in township —, of range —, — meridian, containing — acres, the same being exclusive of the land adjudged to be mineral in said 40-acre tract."

The surveyor must correctly compute the area of such agricultural portion, which computation will be verified by the surveyor general.

No fear need be entertained that miners will be permitted to make entries of tracts, ostensibly as mining claims, which are not mineral, simply for the purpose of obtaining possession and defrauding settlers out of their valuable agricultural improvements; it being almost an impossibility for such a fraud to be consummated under the laws and regulations applicable to obtaining patents for mining claims.

§ 599. The fact that a certain tract of land is decided, upon testimony, to be mineral in character, is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice and posting of diagrams and notices, as a preliminary step, and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto, in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than \$500 thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost, where a survey is required, after which he can enter and pay for the land embraced by his claim.

Circular Instructions, up to and including those of October 31, 1881.

Lode Claims Located before May 10, 1872.—The status of lode claims located previous to the tenth of May, 1872, is not changed with regard to their extent along the lode, or width of surface. Mining rights acquired under such previous locations are, however, enlarged by said revised statutes in the following respects, namely: the locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of congress, and with the state, territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended down-

wards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such locations at the surface; it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges other than the one named in the original location to such as were not adversely claimed on May 10, 1872, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the revised statutes.

In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that \$10 shall be expended annually in labor or improvements, on each claim of one hundred feet on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such veins are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold the claims at the rate of \$10 per hundred feet may be made upon one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequently to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended annually until patent issues. By decision of the honorable secretary of the interior, dated March 4, 1879, such annual expenditures are not required subsequently to entry, the date of issuing the patent certificate being the date contemplated by statute.

Upon the failure of any one of several co-owners of a vein or lode which has not been entered to contribute his proportion of the expenditures necessary to hold the claim or claims so held

in ownership in common, the co-owners who have performed the labor or made the improvements as required by said revised statutes may at the expiration of the year give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by statute.

Patents—Rights of Patentee Enlarged.—Rights under patents for veins or lodes heretofore granted under previous legislation of congress are enlarged by the revised statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of the planes at the surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, other than the one named in the patent, which were adversely claimed on the tenth of May, 1872, are excluded from such conveyance or patent.

Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the general land office; and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the revised statutes.

General circular of April 1, 1879.

CHAPTER XXXIII.

MINING CLAIMS BEFORE COURTS.

MINING LAWS.

- § 600. All Mineral Lands Open to Exploration and Purchase.
- § 601. Definition of the Words "Mining Claim."
- § 602. Definition of the Term "Vein or Lode."
- § 603. Miners' Rules and Regulations.
- § 604. Location of Mining Claims.
- § 605. Locator's Right of Possession.
- § 606. Annual Expenditure.

§ 600. *All Mineral Lands Open to Exploration and Purchase.*—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such; and proof of citizenship may consist, in case of an individual, of his own affidavit thereof; in case of an association of persons unincorporated, of the affidavit of their authorized agent; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of incorporation.

R. S. 2319, 2321.

§ 601. *Definition of the Words "Mining Claim."*—A mining claim is the name given to that portion of the public mineral lands which the miner takes up and holds in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines.

Mt. Diablo Mining Co. v. Gallison, 5 Saw. 439.

The claim must be located on land valuable for mineral, such as slate, fire-clay, borax, mica, umber, petroleum, coal, salt springs and salines, diamonds, gold, silver, cinnabar, lead, tin, and copper, whether in place or placers.

Morton v. Nebraska, 21 Wall. 660; Opinion Attorney General U. S. August 31, 1872.

As to the manner of locating claims upon viens or lodes, and

the steps necessary to be taken to hold the same, see "Mining Claims before the Land Offices."

§ 602. *Definition of the Words "Vein or Lode."*—The terms "vein or lode" as used by miners, and in the mining acts of Congress, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

Flagstaff Co. v. Torbett, 8 Otto, 463; Eureka M. Co. v. Richmond, 4 Saw. 311; Jupiter M. Co. v. Bodie M. Co., 7 Id. 96.

The definition given by Van Cotta on ore deposits (supposed to be the highest scientific authority upon this subject) is as follows: "A fissure in the earth's crust filled with mineral matter; or more accurately, aggregations of mineral matter containing ores in fissures."

Prim's Translation, p. 26.

§ 603. *Miners' Rules and Regulations.*—It is provided by the revised statutes, section 2324, that the miners of each district may make rules and regulations, not in conflict with the laws of the United States, or of the state or territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. These miners' laws have played a conspicuous part, not only in the material development of the country, but in its social, political, and judicial history. They have protected millions of property, and aided in opening a region of incalculable wealth. Prospectors, under this code of laws, with pick, pan, and shovel, on mountain side, amidst winter's rugged grasp, on the plains, under sunny skies, in the quiet nooks and flowery ravines of the lower slopes of the sierras, lifted from the matrix of nature the golden treasure, and toiled on as safely protected in their property, as if in the midst of the highest civilization. Prior to the organization of the state government in California, these rules were the only laws. They assumed both civil and criminal jurisdiction. This is shown in certain rules and regulations adopted by the miners at Jackson, California, on the twentieth of January, 1850. After providing for the election of an alcalde and sheriff, also the manner in which both civil and criminal cases should be tried before the alcalde, and giving the accused in criminal cases the right to a jury trial, and providing for some other things, the twelfth "article," as it is termed, reads as follows:

"Article XII. Any person who shall steal a mule or other animal of draught or burden, or shall enter a tent or dwelling,

and steal therefrom gold-dust, money, provisions, goods, or other articles, amounting in value to one hundred dollars or over, shall, on conviction thereof, be considered guilty of felony, and suffer death by hanging. Any aider or abettor therein shall be punished in like manner."

Public Domain, p. —.

Of course no such rules or regulations were made after the organization of the state government (except by vigilance committees), but miners' laws in reference to mining claims are being constantly made in the mineral regions of the public domain; and so long as the miner complies with these laws, and the laws of congress, and of the state or territory, he has a right to protect his possession of a mining claim against all intruders while he is searching for mineral, even though he has as yet found no mineral in place. But if he stands by and allows others to enter upon his claim and first discover mineral in place, the law gives such discoverer a title to the mineral so first discovered, against which the mere possession of the surface can not prevail.

Crossman v. Pendary, U. S. Cir. Ct. for Colorado; Copp's Mineral Lands, p. 399; Atkins v. Hendree, 1 Idaho, 108.

These rules and regulations are a part of the common law of mining states and territories.

Cooley's Const. Lim., 5th ed., 35, note.

The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners does not invalidate them. Courts will not inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be the judges of their own proceedings. It is sufficient that the miners agree, whether in public meeting or after due notice, upon their local laws, and that these are recognized as rules of the vicinage, unless fraud be shown, or other like cause for rejecting the laws.

Gove v. McBrayer, 18 Cal. 582.

If a record is provided for by local rules, it must, under the provisions of the mining laws of the United States, contain an accurate description of the *locus* of the claim by reference to natural objects or permanent monuments.

Golden Fleece Co. v. Consolidated, 12 Nev. 312.

Local mining customs, whether written or unwritten, must be observed; and if a mining custom allows a person to locate a vein or lode for himself and others by placing thereon a notice,

with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of his claim, and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location become tenants in common with the locator and the others, and can not be divested of their interest by the act of the locators tearing down the notice and posting up another omitting their names, unless this is done with their knowledge and consent.

Morton v. Copper M. Co., 26 Cal. 527.

So long as miners' rules and regulations are generally regarded, they have all the force of customs sanctioned for ages; but whenever they fall into disuse, or are generally disregarded, they are void; and this is a question of fact for the jury. But when shown to have been in force, the presumption is that they continue in force until the contrary is shown.

North Noonday M. Co. v. The Orient, Copp's Mineral Lands, p. 270; Mallett v. Uncle Sam Mining Claim, 1 Nev. 194; Sickels' Mining Laws, p. 45.

The requirements of these rules that locators do a certain amount of work upon their claims are conditions subsequent, and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs.

King v. Edwards, 1 Mont. 235.

§ 604. *Location of Mining Claims.*—Mining claims located since the tenth day of May, 1872, whether located by one or more persons, may equal, but can not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The end lines of each claim must be parallel with each other, and no claim can extend more than three hundred feet on each side of the middle of the vein on the surface. And the description of vein or lode claims upon surveyed lands must designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith.

R. S. 2320, 2327.

All locations except those made in the name of some person, or association of persons, are void *ab initio*.

Sickels' Mining Laws, p. 322.

In regard to location notices, it is generally held, both by

courts and the land department, that they should be liberally construed; and if they are sufficiently certain to put an honest inquirer upon his guard, and the locators have complied with the rules and laws in other respects, they will be held sufficient. But in order to prevent litigation, great care should be exercised in locating and monumenting mineral claims.

Letter of Secretary Delano, *Sickels' Mining Laws*, pp. 100, 162.

Aliens.—Under the act of Congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, or those who have declared their intention to become such, can acquire any right to such lands by location. But if in the attempt to locate a claim an alien performs all the acts necessary to a valid location by a citizen, and then conveys such claim to a citizen who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim so located by the alien as against all persons having acquired no right therein before such conveyance by the alien. And if a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, and a conveyance from both of said locators to a citizen gives a valid title.

Judge Sawyer's charge to the jury in *North Noonday M. Co. v. Orient Co.*, *Copp's Mining Laws*, 370.

The failure of a party to comply with a mining rule or regulation can not work a forfeiture thereto unless the rule itself so provides.

Bell v. Bed Rock Co., 36 Cal. 214.

§ 605. *Locators' Rights of Possession.*—The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns (where no adverse claim existed on the tenth day of May, 1872), so long as they comply with the laws of the United States, and with state, territorial, and local regulations, if any there be, are entitled to the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges is con-

lined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect the exterior parts of such veins or ledges. And where two or more veins intersect or cross each other, priority of title (location) governs, and the party making the prior location is entitled to all ore or mineral contained within the space of intersection; but the party who made the subsequent location is entitled to a right of way through the space of intersection for the purposes of the convenient working of the mine.

R. S. 2322, 2336.

Ordinarily, the owner of a mining claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its dip to any depth; yet if the same vein has been previously discovered and located on the dip, such discovery will prevail against a junior discovery, though located on the apex of the vein.

Van Zant v. Mining Co., U. S. C. Ct. for Colorado; Copp's Mineral Lands, p. 410.

And where the location of a mining claim obliquely crosses the vein or lode which is claimed, the side lines become the end lines, beyond which the claimants can not go.

Van Zant v. A. M. Mining Co., Mining Record, Oct. 1880, p. 259.

In the case of the Elgin Mining and Smelting Company v. The Iron Silver Mining Company, recently decided in the United States circuit court of Colorado, the effect of a failure to have the end lines of a mining claim parallel with each other is considered, and Judge Hallett holds that claims which fail to have the end lines of the location parallel with each other are defective and void, in so far as the owner seeks to follow his vein on its dip beyond his side lines, and into or under adjoining territory, and that the law will not by inference or construction supply end lines to conform to the statute, but will leave the locator or owner to the consequences of his error.

Copp's L. O., March, 1883, p. 245.

Where several persons as tenants in common locate a mining claim upon the public lands, and by failure to comply with the local mining laws forfeit the same, it may be relocated by a part of the first locators along with others who were strangers to the first location, and the tenants in common whose names are left out in the notice of relocation cease to have any interest in the mine.

Strange v. Ryan, 40 Cal. 33.

§ 606. *Annual Expenditure.*—See “Mining Claims before Land Offices.” Labor and improvements are deemed to have been put upon a mining claim where they are made for its development, though in fact such labor and improvements may be at a distance from the claim. The statute requires an annual expenditure; and in estimating the \$500 expenditures essential to authorize entry, improvements made by former locators who had abandoned can not be included. The statute contemplates no interruption of the annual improvement until entry and payment of the purchase money. No person out of possession can obtain a patent, and no one in possession can obtain one except in the prescribed form. One of these requirements is the annual expenditure, and the manner prescribed by the statute precludes every other mode. The first annual expenditure upon all claims located since the tenth day of May, 1872, becomes due at the expiration of one year from the first day of January next following the time of location. When the \$100 expenditure is made each calendar year, the claim is not subject to location, but the work must be performed during that year.

Letter of Commissioner, August 1, 1880; Sickels' Mining Laws, pp. 374, 392.

§ 607. Sometimes the owners of a mining claim, although it may be very valuable, do not choose to ask of the government a patent thereto; and they are entitled to the possession, enjoyment, and profits of such mine for an indefinite period without seeking a patent, and may maintain such rights in the courts, provided they comply with the mining laws in other respects. The only advantage arising from a patent is that the title is then unassailable in a court of law; and a patent stops the necessity for annual expenditure. In every legal proceeding respecting mines, the same rules of law govern as in other cases, except where modified and changed by statute. Of course the proceedings on adverse claims are governed by statute law so far as the same extends. Prior possession alone is sufficient to enable plaintiff to recover in an action of ejectment against a mere intruder. And where plaintiff avers title in fee, proof of possession is evidence of seisin in fee in him; no further or higher evidence of title is required until the defendant shows an anterior possession, or has traced title to a paramount source. Hence, if a less estate than a fee is averred, proof of possession is presumptive evidence of seisin under such averred title.

Sears v. Taylor, 4 Col. 38.

CHAPTER XXXIV.

MINING CLAIMS BEFORE COURTS.

ADVERSE CLAIMS.

- § 608. Notice of Application for Patent; Filing Adverse Claim; What It must Contain; Suit on Adverse Claim.
- § 609. Analysis of the Statute.
- § 610. Notice and Diagram; Publication of Notice.
- § 611. The Eureka Case.
- § 612. When Party out of Possession to Commence Suit.
- § 613. Who can File Adverse Claim.
- § 614. Where End Lines not Parallel, Location Void.
- § 615. Patent, When Void.
- § 616. Statute of Limitations.
- § 617. Surveys.
- § 618. Mill Sites.
- § 619. Act of March 3, 1881.
- § 620. Survey of Mining Levels.

§ 608. *Notice of Application for Patent.*—It is the duty of the register of the land office, upon the filing of an application, plat, field-notes, notices, and proper affidavits for a patent to a mining claim, to publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim, and he must also post such notice in his office for the same period.

R. S. 2325.

What Adverse Claim must Contain.—Where an adverse claim is filed during the period of publication above mentioned, it must be upon oath of the person or persons making the same, and must show the nature, boundaries, and extent of such adverse claim, and upon the filing of claim all proceedings before the land office will be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

Suit on Adverse Claim.—It is the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do will be a waiver of his adverse claim.

R. S. 2326.

After suit is commenced on an adverse claim in a court of competent jurisdiction, the court has exclusive jurisdiction of the question as to which one of the two parties is entitled to the possession of the tract in controversy, and if the court errs, the error can only be corrected by the proper appellate tribunal, and not by the land office or department of the interior.

Letter of Secretary Teller, Copp's L. O., Dec. 1882.

By the judiciary act (section 910, revised statutes), it is provided that no possessory action between persons in any court of the United States for the recovery of any mining claim, or for damages to the same, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, but each case shall be adjudged by the law of possession.

§ 609. *Analysis of the Statute.*—Mining claims are treated by the government as land, and mining patents are issued for so much land, but there are three important distinctions between the laws relating to mineral lands and those relating to other lands:

1. No local rules or regulations like miners' laws are known or recognized in the laws relating to other lands.

2. The mining laws provide for a reference and transfer of all controversies respecting the right of possession of mines to the courts; and no laws in relation to public lands, other than mineral, contain such provision.

3. The law in relation to mineral lands creates in certain cases an estoppel before the issue of patent; but there is no similar provision in reference to agricultural lands. And where lands are acquired under the homestead or pre-emption laws it sometimes occurs that the legal title may be in one person and a superior equity in another, but it seems that this can never occur under the mining laws.

§ 610. *Notice and Diagram.*—Section 2325, revised statutes, provides the manner and the necessary steps to be taken in order to obtain a patent, including a diagram and published notice. The purpose of the diagram and notice is analogous to a legal summons, by which any and all parties are notified that unless within a given time they come forward and claim and defend any right or interest they may have in certain premises, their right to do so shall be barred, and judgment rendered for claimant. This being the case, the importance of having the notice and diagram very carefully prepared will at once be perceived.

Sickels' Mining Laws, p. 501.

The description of the premises in the application for patent, in the notice and diagram filed with the register, and in the notice published by the register should all correspond.

Sickels' Mining Laws, p. 501.

A protest is a challenge of the applicant's own showing, and does not, like an adverse claim, authorize a trial of unascertained rights; in other words, it performs in the land office the same service and occupies the same place that a demurrer does in a court.

Publication of Notice.—Published notice of thirty days is uniformly required of parties who seek agricultural entry on lands withdrawn as mineral. The same rule (thirty days) prevails where a railroad company makes application for selection of land in a mineral region, and during the period of publication any person may come forward and allege under oath that the land is mineral.

The burden of proof will be with the party alleging the land to be mineral.

Commissioner's Letter, July, 1880, Sickels' Mining Laws, p. 501.

§ 611. *The Eureka Case.*—It was held by the supreme court of the United States, in the case of *Shepley v. Cowan*, 1 Otto, 338, that where two parties are contending for the same property (agricultural land), the first in time in the commencement of proceedings for the acquisition of the title, who the same is regularly followed up, is deemed to be the first in right. It was afterwards held in the *Eureka Case*, Justice Field delivering the opinion, that this principle is qualified in its application to mining ground by provisions in the act of 1872 for the settlement of adverse claims before the issue the patent. Under that act, when one is seeking a patent for his mining location, and gives proper notice of the fact as therein prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. "While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there be, deriving title from other sources, such perhaps as might arise from a subsequent location of a school warrant, or a subsequent purchase from the state, the doctrine can not be applied so as to cut off the rights of the earlier patentee under a later location, where

no opposition to that location was made under the statute. Silence of the first locator under the statute is a waiver of his priority."

Eureka Consolidated Mining Co. v. Richmond Co., 4 Saw. 302.

This is very high authority, and although that portion of the opinion above quoted seems to be *obiter dictum*, it doubtless prescribes the general rule. But may there not be exceptions to it? The statute provides that if a party fails to commence proceedings on his adverse claim in a proper court within thirty days after the filing of the same, such failure shall be a waiver of his adverse claim; but the statute does not say that a failure to file such claim shall be a waiver. While there can be no doubt of the right of the court to make the rule, yet if a party having a better right to the tract or mine is prevented from filing an adverse claim in the local land office by fraudulent acts of the other party, or the negligence of government officials, or by any other occurrence which renders a strict compliance with the law an impossibility, would the rule be so modified, upon a proper showing, as to permit the party injured to sue in his own name? In other words, may not a certain state of facts form an exception to the rule? Actions upon the ground of fraud or mistake are frequently brought in courts of equity to enforce some right or prevent some wrong to mining property; and if the rule above referred to is to be enforced without qualification or exception, there can be no doubt that a suit may be brought by the government to set aside a patent on the ground of fraud, mistake, etc., upon a proper application to the secretary of the interior or attorney general of the United States.

Mayendorff v. Frohner, 3 Mont. 282; Field v. Seabury, 19 How. 323.

But mistake to be available in equity must not have arisen from negligence when the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person, and upon the discovery of the fraud, he must act at once.

Kinney v. Con. Virginia Min. Co., 4 Saw. 446; Grimes v. Sanders, 3 Otto, 61.

§ 612. *When Party out of Possession to Commence Suit.*—The evident intention of congress in passing the laws in relation to adverse claims was to require the parties to try the right of possession and have the controversy determined in the state courts, by the same rules, and governed by the same principles, and

controlled by the same statute, that apply in other cases; and the question whether an adverse claim has been prosecuted with reasonable diligence is a question for the court which has acquired jurisdiction to determine.

If the case is dismissed, the applicant should cause the judgment of dismissal to be certified to the general land office. The party who sets up an adverse claim should commence the suit, except where he is in possession, and in that case a definite time will be allowed the party out of possession to commence the suit.

220 Mining Co. v. Bullion Mining Co., 9 Nev. 240; Sickels' Mining Laws, pp. 288-302.

§ 613. *Who can File Adverse Claim.*—Only interested parties can file adverse claims, and the fact that they are interested parties must be shown, either by an abstract of record or in some other way. The adverse claim should state fully and in detail the facts upon which a party expects to rely, and any state of facts which shows that he has a better right to the premises applied for than the applicant, is the proper subject-matter of an adverse claim. The adverse claim must be upon the oath of the party making the same, and must show the nature, boundary, and extent of the same.

Sickels' Mining Laws, pp. 198, 278, 288-302.

In case of an amicable adjustment between adverse claimants of a mining claim a survey will be required to show the compromise line and the exterior boundaries of the claim. The survey, and map and certificate, and certificate as to the amount of work done, must be sworn to.

Sickels' Mining Laws, pp. 264, 269.

Secretary Schurz holds that where parties fail to file adverse claims within the legal period, they can not be recognized by the land department as parties in interest, and are not entitled to the right of appeal. He also holds that where mining claims and the rights of the respective owners depend on the actual intersection of the veins and priority of location, that these are matters within the peculiar province of the court to determine, and that where there is reason to believe that a contest may arise in future, the rights of neither party should be prejudiced prior to judicial determination by the insertion of unnecessary *habendum* or *redendum* clauses in the patent.

Sickels' Mining Laws, p. 246.

§ 614. *Where End Lines not Parallel, Location Void.*—Courts have no power to establish either the end lines or the side lines

of a mining claim. The end lines established by a locator must control, and if absent or so placed as not to define the rights of the locator to the exterior parts of the lode, the defect can not be supplied. Where the end lines of a claim are not parallel with each other, the location is void in so far as the owner seeks to follow his vein on its dip beyond his side lines. The reason of this rule seems to be that the end lines of a claim are the boundaries of the vein on its strike, and when extended—the end lines being the only limitation upon the claimant's right to work the vein on its dip—to allow a claim having end lines not parallel, and consequently divergent when extended, would be giving more than one thousand five hundred feet in length of the vein upon one side of the claim, which is more than the law allows.

Elgin M. Co. v. Iron & S. M. Co., U. S. C. Ct. for Colorado; Copp's L. O., March, 1883, p. 245.

There is nothing in the statute which requires an adverse claimant to establish any further compliance with the requirements of the mining laws than that of properly asserting such claim in the courts; and the courts must judge whether he has thus protected himself.

Sickels' Mining Laws, p. 176.

An allegation by an adverse claimant that he is the owner of the claim in controversy is a proper allegation; and the verification of an adverse claim stating that the party making it is the president of the corporation filing the same is sufficient.

§ 615. *Patent Void when Unauthorized.*—Neither an entry nor a patent vests title unless the land was sold according to the rules and laws applicable to the class of lands to which the particular tract belongs. Thus the executive department of the government has no right or authority to sell land as agricultural land which is in fact mineral. The supreme court of the United States, in the case of *United States v. Stone*, 2 Wall., say: "Patents are sometimes issued unadvisedly or by mistake, where the officer had no authority in law to grant them; and in such cases courts of law will pronounce them void."

§ 616. *Statute of Limitations.*—State or territorial statutes of limitations constitute a part of the local laws; and an adverse possession for the time limited by the statute not only bars the remedy, but extinguishes the right. And one tenant in common may oust his co-tenant and claim adversely, thereby setting the statute of limitations in motion.

420 Mining Co. v. Bullion Co., 3 Saw. 634.

§ 617. *Surveys*.—The survey of every mining claim should show:

1. The exterior boundaries of the claim, both in the plat of survey and in the field-notes.

2. The intersections of the lines of the survey with the lines of the conflicting prior surveys should be noted in the field-notes and represented upon the plat.

3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey.

Copp's L. O., Feb. 1883, p. 162.

Courses and distances and the amount of land specified must all give way when in conflict with calls which are fixed and permanent objects.

Sickels' Mining Laws, p. 127.

§ 618. *Mill Sites*.—A mill site must not be valuable for mining purposes. It must not abut against the end of a lode or claim; but a mill site contiguous to the side lines of a claim may be patented. Clauses are inserted in mineral patents reserving water rights, easements, drainage, etc., and generally, as in California, the right to a particular ditch or canal is regulated by the local laws and customs, and the decisions of the courts of the state.

Sickels' Mining Laws, pp. 461-467.

In the construction of statutes, the land department, like courts of justice, hold that a thing within the letter is not always within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter.

Letter of Secretary Delano, April 1, 1875; 4 Brac., tit. Statutes, secs. 38-50; *Burgett v. Burgett*, 1 Ohio, 221; *Spicer v. Gelesman*, 15 Id. 341.

After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections sixteen and thirty-six for school purposes, and the secretary of the interior had no authority to list such lands to the state; and where such lands have been listed over to the state, and patented to private individuals, a court of equity will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake or error of law. Such bill should be filed

by the United States and signed by the attorney general of the United States.

United States v. Mullen, 7 Saw. 466; United States v. Throckmorton, 98 U. S. 61.

§ 619. *Act of March 3, 1881.*—The act of congress, approved March 3, 1881, provides, that if in any action brought pursuant to section 2326, revised statutes (in reference to adverse claims), title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office, nor be entitled to a patent for the ground in controversy until he shall have perfected his title.

§ 620. *Survey of Mining Levels.*—Where two claims adjoin each other, it sometimes happens that there is a dispute as to the boundaries of the claims beneath the surface. And where it is positively, or on information and belief, averred in the complaint or answer in an equity proceeding respecting a lode claim that the opposite party is trespassing on the other's claim or lode below the surface through the deep shafts, levels, or chambers of his mine or lode, and taking or threatening to take from the pleader's mine or lode the valuable mineral deposits therein contained; that the pleader is and will be unable to prove these facts unless a survey of the underground works of the other party be made; that said party refuses to allow such survey to be made, and that the party pleading will be irremediable without such survey; and the complaint is in other respects sufficient, the court will sometimes order a survey to be made.

Story's Eq. Jur., sec. 615.

CHAPTER XXXV.
MINING CLAIMS BEFORE COURTS.

PLACER CLAIMS.

- § 621. Location, Notice, Labor.
- § 622. Proof as to Character of Land.
- § 623. School Lands.
- § 625. Petroleum.
- § 626. Patents.
- § 627. Applications for Patent.
- § 628. Void Patents.
- § 630. When Rights Attach under Patent.
- § 631. Taxation of Mines and Minerals.
- § 632. Partnership Rights and Obligations; Power of Superintendent to Bind Partnership; Prospecting Contracts; When Partnership Inferred; Liabilities.
- § 633. Receivers.
- § 634. Estoppel by Record; Estoppel *in Pais*.

§ 621. *Location, Notice, and Labor*.—No location of a placer mine for a single individual can embrace more than twenty acres; and no association of individuals can obtain a patent for more than one hundred and sixty acres; but any one person may, by purchasing other claims, be entitled to a patent for one hundred and sixty acres. Five hundred dollars expenditures are not required on each location where they are contiguous and constitute one claim.

R. S. 2330, 2331; Sickels' Mining Laws, p. 348.

Notice must be published and posted.

R. S. 2330, 2331; Sickels' Mining Laws, p. 348.

Locations of placer claims made prior to July 9, 1870, upon land over which the public surveys have not been extended, may be patented in any shape or to any area not in conflict with local laws or regulations, provided not less than one thousand dollars have been expended thereon.

Sickels' Mining Laws, p. 340.

Placer mining claims upon public lands must both be held and worked, not only according to the United States laws, but also in accordance with the state and local district laws in force in the district where the same are located, when such laws, rules, and regulations are not in conflict with United States laws.

Strange v. Ryan, 46 Cal. 33; Sickels' Mining Laws, p. 335.

When the local rules or laws in force in a mining district restrict locations to less than twenty acres for each individual, they must be observed; but where they permit locations in excess of limits fixed by congress, they are restricted accordingly.

Sickels' Mining Laws, p. 339.

§ 622. *Proof as to Character of Land.*—When land is returned as mineral on the township plat, clear and positive proof will be required to establish its non-mineral character.

Sickels' Mining Laws, p. 349.

And where land is located on a well-known mineral region, the burden of proof is upon the person alleging the same to be agricultural in character; or in other words, the presumption is that the land is mineral.

Sickels' Mining Laws, p. 355.

Until the township plat of survey is approved by the surveyor general and has been filed in the local office, the register and receiver will treat an application for patent on placer claim as being made for unsurveyed lands.

Sickels' Mining Laws, p. 341.

All veins of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit claimed or known to exist within the exterior boundaries of the claim at the date of the patent are, by the terms of the patent itself, excluded from its operation.

Sickels' Mining Laws, p. 343.

In all applications for patents for placer land satisfactory proof must be furnished that the premises applied for do not contain any known veins of quartz or other rock in place containing gold or other valuable mineral.

Sickels' Mining Laws, p. 349.

Salt springs and salines in the north-west territory and in the Louisiana purchase are treated as mineral, and can not be entered when the land is known to be of this character.

Morton v. Nebraska, 21 Wall. 660.

§ 623. *School Lands.*—The grant of school lands takes effect from the date of survey, and carries with it all mineral deposits, of whatsoever nature or kind, not known to exist in those sections at that date; but it does not convey these sections when they are known or recognized and regarded as mineral lands at the time of survey.

3 Otto, 309.

Minerals discovered on land after patent pass with the patent.

Moore v. Robbins, 6 Otto, 530.

But land discovered to contain valuable mineral deposits, after same has been entered as agricultural but before patent has issued, is subject to mineral location and entry, and the agricultural entry will be canceled for so much as is mineral.

Sickels' Mining Laws, p. 449.

§ 624. The University of California selected certain unsurveyed land, and upon the filing of the township plat these selections were adjusted to the lines of the public survey, and approved December 6, 1872. The testimony showed that the land had been known to be valuable for petroleum since 1864: held, that the land was mineral and the selection void, and the governor of the state was requested to relinquish the land to the United States.

Sickels' Mining Laws, p. 438.

A party having claimed land as mineral, adversely to another, is estopped from claiming the same land as agricultural.

Sickels' Mining Laws, p. 441.

Mineral lands upon which the mineral has been exhausted and the mines abandoned is subject to agricultural entry if the application is made in good faith.

Sickels' Mining Laws, p. 440.

The words "reserved for public uses," in the act of 1866, were not meant to cover those lands which passed to the state of California, either under the swamp-land act or the school-land act.

Sickels' Mining Laws, p. 440.

§ 625. *Petroleum*.—Petroleum is both a fluid and a mineral.

Dork v. Johnson, 55 Pa. St. 164.

Wells are frequently held by parties as tenants in common.

Mason v. Norris, 18 Grant's Ch. 500.

A quantity of oil was sold by sample in a bottle, which was represented to be of specified quality; a written agreement was then drawn for the delivery of "oil of the quality of the sample;" such oil was in fact delivered, but the sample in reality was a cheap crude oil instead of refined oil of a particular grade: held, that it was a palpable fraud, and that the defendant might show that the oil was not of the quality which he agreed to deliver.

Mante v. Gross, 66 Pa. St. 250.

Where a certain quantity of oil is purchased and before it is all delivered the vessel into which it is being delivered is consumed by fire, the purchaser is not responsible, but the loss falls upon the seller.

Rochester Oil Co. v. Hughey, 56 Pa. St. 322.

§ 626. *Patents.*—In the application for patent the affidavit of publication should show a continuous publication and a compliance with all mining laws in force, together with proof of citizenship, and must be accompanied with a certified copy of the mining laws of the district in force at the date of the location.

Sickels' Mining Laws, p. 84.

No person who is out of possession can obtain a patent, except in the manner and form prescribed in the statute; but it has been held, that notwithstanding section 2324 of the revised statutes provides in terms that a possessory claim may be relocated at any time prior to the issue of a patent, if the necessary labor and improvements shall be neglected for one year, yet an entry made is equivalent to a patent issued.

Stork v. Storrs, 6 Wall. 418.

§ 627. *Applications of Patent.*—When all the preliminary and necessary steps have been complied with, an application in writing for a patent may be made. This application should recite in detail all the steps which have been taken, and must accurately describe the property for which a patent is asked. The application, when all necessary steps have been complied with, is such an appropriation of the premises embraced therein as takes them out of the operation of the local laws, and suspends the necessity for annual expenditure until the issuance of a patent. Publication of notice of application for a patent must be made continuously in one newspaper, and must not be made without the knowledge of the register of the land office.

Sickels' Mining Laws, p. 66.

§ 628. *Void Patents.*—Neither an entry nor a patent vests title unless the land was sold according to the rules applicable to the class of lands to which the particular tract belongs. A patent is but the evidence of the grant, and the officer who issues it acts ministerially, and not judicially, and if he issues a patent for lands reserved from sale by law, such patent is void for want of authority; for example, the executive department has no right to sell lands as agricultural which are in fact mineral, and patents are sometimes issued inadvertently, or by

mistake, where the officer had no authority to issue them. In all such cases courts of law will pronounce the patent void.

United States v. Stone, 2 Wall. 1.

Patents for lands which have been previously granted, reserved from sale, or appropriated are simply void.

Morton v. Nebraska, 21 Wall. 660.

In case of the loss of the duplicate receipt or certificate of purchase, the applicant for patent must show by affidavit that the same has been lost, and after careful and diligent search can not be found, and must state as nearly as possible the circumstances how, when, and where the same was lost.

Sickels' Mining Laws, p. 513.

A waiver in writing of all right to that portion of a mining claim which is in controversy entitles the claimant to a patent for that portion of the claim not in controversy.

Sickels' Mining Laws, p. 279.

§ 629. It is the duty of the register and receiver, in the first instance, to pass upon the regularity of the claimant's application for a patent, as well as upon his right to make the same for the tract therein described; and if no adverse claim is filed before the approval of the survey by the surveyor general, the right of the applicant to a patent (if all the preceding requirements are regular) is established. The application need not be under oath.

Toy Long v. Chapman, 4 Saw. 28.

Minerals discovered on land after patent pass with the patent, unless expressly reserved.

Moore v. Robbins, 6 Otto, 530; Fremont v. Fowler, 17 Cal. 200.

§ 630. *When Rights Attach under Patents.*—When a patent for a mining claim finally issues, it attaches itself to the entry and relates to the date of the entry, and has the same effect as if issued at the date of the entry.

Hydenfeldt v. Dana Mining Co., 93 U. S. 641; Bagnall v. Broderick, 13 Pet. 450; Gibson v. Chatteau, 13 Wall. 93; Shepley v. Cowan, 91 U. S. 337; Smelting Co. v. Kemp, 104 Id. 647; Hayner v. Stanley, 8 Saw. 225.

And such patent carries all mines in the land patented to which no right has attached at the time the patent issues.

Pacific Coast Mining & M. Co. v. Spargo et al., Copp's L. O., June 1, 1883, p. 81.

§ 631. *Taxation of Mines and Minerals.*—Where the claimant of a mine is the owner of the soil the mine itself may be taxed;

in other cases only the possessory right can be taxed. Such claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the non-payment of them without infringing the title of the United States. And although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and becoming personal property, are as such subject to state taxation in like manner as other personal property.

Forbes v. Gracy, 4 Otto, 762.

§ 632. *Partnership Rights and Obligations.*—Sometimes nice questions arise as to whether the owners of a mining claim are partners or tenants in common. In the absence of any special agreement, the locators of a mining claim and their assigns, before any work is commenced on the claim, are generally tenants in common simply; but when companies of adventurers are formed for the purpose of mining and selling minerals, and as such acquire mining claims, such association is a species of mining partnership, and although there may be no written agreement to evidence such partnership, yet a tacit understanding that the profits and losses were to be shared in proportion to their several and respective interests is sufficient to hold and create a lien on the undivided interest of each owner in the mining claim for the company's liabilities. And if a member of a mining partnership sells his interest in the mine, the purchaser takes it subject to an claim existing in favor of a copartner for debts due the creditors, or advances made for the uses of the concern, unless he becomes a purchaser in good faith for a valuable consideration without notice of such lien. But if while a mining company is engaged in working its mining grounds as partners, one partner sells his interest in the mine, the purchaser will be deemed to buy with notice of any lien resulting from the relations of the partners to each other and to the creditors of the partnership.

Duryea v. Burt, 28 Cal. 569.

Mining partnerships are not dissolved by the death or bankruptcy of one of the members, nor by the assignment of his interest.

Taylor v. Castle, 42 Cal. 367; *Copp's Mining Laws*, p. 440.

Superintendent—Power to Bind Partnership.—Notwithstanding the case of *Jones v. Clark et als.*, 42 Cal. 180, wherein some doubt and qualifications were expressed, yet from a recent

decision of the supreme court of the United States in the case of *Post v. Pierson*, it seems now to be established that the superintendent of a mining partnership can bind the partnership by a written contract signed by him as superintendent in all matters and contracts necessarily involved in the transaction of the business without any express previous authority from the partnership.

Vol. 2 Supreme Court Reporter, 799.

Upon the same principle, it would seem that where a promissory note is binding upon a mining partnership as a valid contract, such contract continues, and the partnership continues liable at least to the extent of the partnership assets, though some members of the company may have parted with their interest—especially if the new members purchased with knowledge of the partnership debts. And a retiring partner still continues bound for a partnership debt, though he parts with his equity to have the partnership debts paid out of the partnership property. But in another case it was held that where two persons entered into an agreement to engage together in a mining adventure under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine and paid a note given in the firm's name for a portion of the price, the contract was one of partnership in the ordinary sense, and that either partner had the authority to bind the firm.

Decker v. Howell, 42 Cal. 636; *Bybee v. Howkett*, 8 Saw. 176.

Prospecting Contracts.—An agreement between one or more persons who claim an undeveloped mine and another person that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those qualified partnerships common in California known as mining partnerships.

30 Cal. 490.

Where six persons in Massachusetts associated together, contributed money, and sent one of their number to California to select a mine which they were to buy and work if his recommendation should be satisfactory, and his associates advanced him five hundred dollars for expenses, and agreed to pay him the balance of expenses: held, that the association was a partnership; that the plaintiff, though agent, was also a partner, and

that he could only recover in equity for an accounting for his expenditures, and could not maintain an action at law, the sum claimed not being agreed upon on settlement.

Duff v. McGuire, 99 Mass. 300.

Upon bill in equity afterwards brought on the same contract, it was held that the rule that a partner in a joint adventure can not charge a compensation for his services in the joint business, did not apply to such special arrangement, and they stood upon the same footing as if a stranger had been employed.

Duff v. McGuire, 107 Mass. 87.

Where under a mining partnership between Welland, Gross, Koch, and Huber, in which each party was to have an equal interest, Huber located one thousand feet of mining ground, four hundred in his own name, and two hundred in the name of each of his partners, and afterwards Welland, Gross, and Koch brought suit against Huber for a dissolution and conveyance to them of their interest in the four hundred feet located in the name of Huber: held, that the fact that Welland, Gross, and Koch had conveyed all the interest located in their names to Huber, and declared that they had sold out their interest in the mine, constituted no defense, and that the admission of such conveyances as evidence that Huber had acquired plaintiff's interest in the four hundred feet located in his name was error.

Welland v. Huber, 8 Nev. 203.

When Partnership Inferred.—Parties owning a mining claim as tenants in common, and engaged in working the same, are partners.

Dougherty v. Creary, 30 Cal. 290.

A mining partnership may be inferred from facts and circumstances; as by suffering names to be used jointly, and otherwise holding themselves out as partners.

Lyell v. Sanbourne, 2 Mich. 109.

It is sufficient evidence to prove that a person is a member of a mining company that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement.

Owen v. Van Ulster, 1 Eng. L. & Eq. 396.

A water ditch is real estate, and each interest may be sold or incumbered without regard to the consent of the co-proprietors.

Bradley v. Harkness, 26 Cal. 69.

Liabilities.—All the partners of a firm are liable for the debts contracted by the mining partnership, but this responsibility may be limited by express notice by one that he will not be liable for the acts of his copartners.

Vice v. Fleming, 1 You. & Jer. 227.

When a firm is composed of more than two members, a majority ought to control, and it is doubtful whether any one could limit his liabilities for necessities. Laborers that are hired by one member of a mining firm can not recover their wages from the firm if they had notice of an express agreement that such a contract must be ratified by all the members.

Nolan v. Lovelock, 1 Mont. 224.

A partner is by that relation a general agent for his copartners in all matters relating to the copartnership.

Ootey v. Bourne, L. J. Ex. 361; Brown v. Kidder, 3 H. & N. 853.

§ 633. *Receivers.*—A court of equity has no power to dissolve a corporation without statutory authority, and then the statute must be followed. The appointment of a receiver prevents the corporation from exercising its powers, and virtually winds it up, and therefore the judgment is reversed.

Irwin Davis v. Flagstaff Mining Co., 2 Utah 74; French Bank Case, 53 Cal. 495.

A party must have fully and completely exhausted his remedy at law before he is entitled to the aid of a receiver in equity, and where a bill does not show that there is an impediment in the way of enforcing a judgment at law, no ground is presented for the appointment of a receiver.

Parker v. Moore, 3 Edw. Ch. 234.

While courts are usually averse to taking possession of lands by a receiver pending litigation between conflicting claimants, yet in mineral countries, as in California, the extraction of gold from the soil is something more than the ordinary use of real estate by one in possession, and such a use of the realty constitutes a waste or destruction of the property itself, and upon a proper showing a receiver will be appointed.

Hill v. Taylor, 22 Cal. 191; S. C., 28 Id. 581.

Section 564 of the code of civil procedure does not confer upon courts of equity power to appoint a receiver of the property of a corporation, and the district court had no jurisdiction to appoint a receiver in the action of ejectment.

Bateman v. Superior Court, 54 Cal. 285.

It has been held in England that where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners in a suit which does not seek to dissolve the partnership, nor even in that case, unless it is shown that one partner has interfered so as to prevent the business being carried on.

Roberts v. Eberhardt, 1 Kay, 148; S. C., 23 Eng. L. & Eq. 245.

But it has been held in North Carolina that it is frequently better and more equitable in mining cases to appoint a receiver than to grant an injunction, as under a receiver the business may still be carried on.

Deep River G. M. Co. v. Fox, 4 Ired. Eq. 61.

And in Iowa it has been held that if it is shown to the court that a sudden stoppage of the working of the mines would work material injury to the interest of the partners, the court may direct a continuance of the same by a receiver until further order.

Levi v. Karrick, 8 Iowa, 155.

And where the different owners do not agree in the management of a mine, a receiver may sometimes be appointed.

Wyngett v. Heacoth, 4 You. & Coll. 187.

The appointment of a receiver is a strong measure, and the court, in its sound discretion, must be convinced that it is needful.

The plaintiff must show either a clear right or a *prima facie* right, with such circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.

Chicago Coal Oil Co. v. U. S. Petroleum Co., 57 Pa. St. 83.

§ 634. *Estoppels*.—There are two kinds of estoppel: estoppel by record, and estoppel *in pais*. Estoppel by record may be by deed, by judgment, by averments in pleadings, by lease, by mortgage, and in some other ways. A judgment, to operate as an estoppel, must be a judgment of a court of competent jurisdiction upon the same subject-matter, in a cause regularly tried on its merits, upon issues duly joined by proper pleadings in such court between the same parties or their privies.

Boggs v. Clark, 37 Cal. 236.

Estoppel in Pais.—The doctrine of estoppel *in pais* proceeds wholly on the theory that the party to be estopped has by his declarations or conduct misled another to his prejudice, so that

it would be a fraud upon him to allow the true state of facts to be proved.

When invoked in respect to the title of property, to constitute an estoppel it must appear:

1. That the party making the admission by his declarations or conduct was apprised of the true state of his own title;

2. That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud;

3. That the other party was not only destitute of all knowledge of the true state of the title, but of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence; and,

4. That he relied directly upon such admissions, and will be injured by allowing its truth to be disproved.

Martin v. Zellerbach, 38 Cal. 300; *Boggs v. Merced M. Co.*, 14 Id. 367.

When there is a protest, contest, and trial, and the court adjudges that the title to the land is not in the state of California, and that neither party has the right to purchase the land from the state, the applicant is ever afterwards estopped from saying that there was title to such land in the state at the date of such judgment; and inasmuch as the question of title in the general government was also an issue in the case, the applicant is also estopped from denying that the title was in the United States at that time.

Thompson v. True, 48 Cal. 601.

What Constitutes an Estoppel in Pais.—The effect of the doctrine of equitable estoppel is to withdraw title to realty from the operation of the statute of frauds, to leave it resting in parol, to preclude its assertion by evidence less conclusive, less certain, and more liable to the taint of human imperfections than the written evidence required by the statute, and in this view its enforcement should be carefully guarded and unhesitatingly refused, except where all the elements of an estoppel are present.

To constitute such an estoppel, there must be:

1. A representation or concealment of *material facts*.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant* of the truth of the matter.

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced* to act upon it.

There are qualifications to the second and fourth propositions. The second is true unless the party making the representations was bound to know the facts, or ignorance of them was the result of gross negligence. The fourth is true with the qualification that gross and culpable negligence upon the part of the party sought to be estopped, the effect of which is to work a fraud on the party setting up the estoppel, supplies the place of intent.

Patterson v. Hitchcock, 3 Col. 533; *Henshaw v. Bissell* 18 Wall 271.

CHAPTER XXXVI.

MINING CLAIMS BEFORE COURTS.

MINERAL LANDS.

- § 635. Mineral Lands Reserved.
- § 636. Mineral Lands Open to Purchase by Citizens.
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§ 665. Pre-emption Claims of Coal Lands to be Presented within Sixty Days, etc.

§ 666. Only One Entry Allowed.

§ 667. Conflicting Claims.

§ 668. Rights Reserved.

§ 635. *Mineral Lands Reserved.*—In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

14 Stat. 86; 18 Id. 476; R. S. 2318.

§ 636. *Mineral Lands Open to Purchase by Citizens.*—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

17 Stat. 91; 19 Id. 52; R. S. 3319.

§ 637. *Length of Mining Claims upon Veins or Lodes.*—Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other.

17 Stat. 91; 19 Id. 52; R. S. 2320.

§ 638. *Proof of Citizenship.*—Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons

unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

17 Stat. 94; 19 Id. 52; R. S. 2321.

§ 639. *Locators' Rights of Possession and Enjoyment.*—The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. No possessory action between individuals, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession.

13 Stat. 441; 17 Id. 91; 19 Id. 52; R. S. 910, 2322.

§ 640. *Owners of Tunnels, Rights of.*—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known.

to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

17 Stat. 92; 19 Id. 52; R. S. 2323.

§ 641. *Subjects upon Which Miners may Make Regulations.*—The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year; *provided*, that the period within which the work required to be done annually on all unpatented claims, so located, shall commence on the first day of January succeeding the date of location of such claim. On all claims located prior to the tenth day of May, 1872, \$10 worth of labor shall be performed or improvements made by the first day of January, 1875, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the tenth day of May, 1872, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. Upon a failure to comply with the foregoing conditions of annual expenditure, the claim or mine upon which such failure occurred shall be open to reloca-

tion in the same manner as if no location of the same had ever been made; *provided*, that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

17 Stat. 92; 18 Id. 61, 315; 19 Id. 52; 21 Id. 61; R. S. 2324.

§ 642. *Patents for Mineral Lands, how Obtained.*—A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground; and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor general

that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established, and this provision shall apply to all applications for patents to mineral lands pending on the twenty-second day of January, 1880.

17 Stat. 92; 19 Id. 52; 21 Id. 61; R. S. 2325.

§ 643. *Adverse Claim, Proceedings on.*—Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings, in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, to-

gether with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver \$5 per acre for his claim, together with the proper fees; whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general; whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties, according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.

17 Stat. 93; 19 Id. 52; R. S. 2326.

§ 644. *Description of Vein Claims on Surveyed and Unsurveyed Lands.*—The description of vein or lode claims upon surveyed lands shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

17 Stat. 94; 19 Id. 52; R. S. 2327.

§ 644 a. *Pending Applications, Existing Rights.*—Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, 1872.

17 Stat. 94; 19 Id. 52; R. S. 2328.

§ 644 b. *Conformity of Placer Claims to Surveys, Limit of.*—Claims usually called "placers," including all forms of deposit,

excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

16 Stat. 217; R. S. 2329.

§ 645. *Subdivisions of Ten-acre Tracts, Maximum of Placer Locations.*—Legal subdivisions of 40 acres may be subdivided into 10-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than 10 acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, 1870, shall exceed 160 acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

16 Stat. 217; R. S. 2330.

§ 646. *Conformity of Placer Claims to Surveys; Limitation of Claims.*—Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than 20 acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than 40 acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

17 Stat. 94; 19 Id. 52; R. S. 2331.

§ 647. *What Evidence of Possession, etc., to Establish a Right to a Patent.*—Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such

period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

16 Stat. 217; R. S. 2332.

§ 648. *Proceedings for Patent for Placer Claims, etc.*—Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of \$5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of \$2.50 per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 637, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

17 Stat. 94; 19 Id. 52; R. S. 2333.

§ 649. *Surveyor General to Appoint Surveyors of Mining Claims, etc.*—The surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than 160 acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and in case of excessive charges for publication,

he may designate any newspaper published in a land district where mines are situated for publication of mining notices in such district, and fix the rates to be charged by such paper; and to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office.

17 Stat. 95; 19 Id. 52; R. S. 2334.

§ 650. *Verification of Affidavits, etc.*—All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land, and the register shall require proof that such notice has been given.

17 Stat. 95; 19 Id. 52; R. S. 2335.

§ 651. *Where Veins Intersect, etc.*—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

17 Stat. 96; 19 Id. 52; R. S. 2336.

§ 652. *Patents for Non-mineral Lands, etc.*—Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and

the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

17 Stat. 96; 19 Id. 52; R. S. 2337.

§ 653. *What Conditions of Sale may be Made by Local Legislation.*—As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

14 Stat. 252; 19 Id. 52; R. S. 2338.

§ 654. *Vested Rights to Use of Water for Mining, etc.—Right of Way for Canals.*—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

14 Stat. 253; R. S. 2339.

§ 655. *Patents, Pre-emptions, and Homesteads Subject to Vested and Accrued Water Rights.*—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

16 Stat. 218; R. S. 2340.

§ 656. *Mineral Lands in Which No Valuable Mines are Discovered Open to Homesteads.*—Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by

citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of \$1.25 per acre, and in quantity not to exceed 160 acres; or they may avail themselves of the provisions of chapter 8, relating to homesteads.

14 Stat. 253; R. S. 2341.

§ 657. *Mineral Lands, how Set Apart as Agricultural Lands.*—Upon the survey of the lands described in the preceding section, the secretary of the interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

14 Stat. 253; R. S. 2342.

§ 658. *Additional Land Districts and Officers, Powers of the President to Provide.*—The president is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, whenever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

14 Stat. 252; R. S. 2343.

§ 659. *Provisions of this Chapter not to Affect Certain Rights.*—Nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July 25, 1866.

16 Stat. 218; 17 Id. 96; 19 Id. 52; R. S. 2344.

§ 660. *Mineral Lands in Certain States Excepted.*—The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the states of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, 1872. And any *bona fide* entries of such lands within the states named since the tenth

day of May, 1872, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

17 Stat. 465; R. S. 2345.

§ 661. *Deposits of Coal, Iron, and Lead in Missouri and Kansas Excepted.*—Within the states of Missouri and Kansas deposits of coal, iron, lead, or other mineral are excluded from the operation of the preceding sections of this chapter, and all lands in said states shall be subject to disposal as agricultural lands.

19 Stat. 52.

§ 662. *Grants of Lands to States or Corporations not to Include Mineral Lands.*—No act passed at the first session of the thirty-eighth congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, 1865, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant; and all mineral lands are excepted from the operation and grants of laws heretofore granting lands to the state of Colorado.

13 Stat. 576; 18 Id. 476; R. S. 2346.

§ 663. *Entry of Coal Lands.*—Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding 160 acres to such individual person, or 320 acres to such association, upon payment to the receiver of not less than \$10 per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than \$20 per acre for such lands as shall be within fifteen miles of such road.

17 Stat. 607; R. S. 2347.

§ 664. *Pre-emption of Coal Lands.*—Any person or association of persons, severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference

right of entry, under the preceding section, of the mines so opened and improved; *provided*, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than \$5,000 in working and improving any such mine or mines, such association may enter not exceeding 640 acres including such mining improvements.

17 Stat. 607; R. S. 2348.

§ 665. *Pre-emption Claims of Coal Land to be Presented within Sixty Days, etc.*—All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, 1873, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, 1873.

17 Stat. 607; R. S. 2349.

§ 666. *Only One Entry Allowed.*—The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections either as an individual or a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section 417 shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

17 Stat. 607; R. S. 2350.

§ 667. *Conflicting Claims.*—In case of conflicting claims upon coal lands where the improvements shall be commenced after the third day of March, 1873, priority of possession and

improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, 1873, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

17 Stat. 607; R. S. 2351.

§ 668. *Rights Reserved*.—Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, 1873, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

17 Stat. 607; R. S. 2352.

The act of April 26, 1882, entitled "An act to amend section 2326 of the revised statutes," etc., modifies some of the rulings of the land department. It provides "that the adverse claim required by section 2326 of the revised statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant; if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the state or territory where the adverse claimant may then be, or before any notary public of such state or territory."

"Sec. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any state or territory."

The act approved March 3, 1881, is as follows: "If in any action brought pursuant to section 2326 of the revised statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office, nor be entitled to a patent for the ground in controversy, until he shall have perfected his title."

CHAPTER XXXVII.

MINING CLAIMS BEFORE COURTS.

MINING CORPORATIONS.

- § 669. *Sui Generis* is California.
- § 670. Leading Cases on the Law of *Ultra Vires*.
- § 671. Implied Powers and Contracts.
- § 672. Assumption of Debts and Liabilities.
- § 673. Sales by Corporation, when Presumed Lawful or Otherwise.
- § 674. Torts and Frauds.
- § 675. By-laws, Elections, Meetings, and Dissolution.
- § 676. Obligations and Penalties.
- § 677. Organization—Legal Existence.
- § 678. Defective Charter.
- § 679. Reorganization—New Company.
- § 680. Officers and Agents.
- § 681. Stock and Stockholder.
- § 682. Stock—Sold, Pledged, Donated, Lost, or Stolen.
- § 683. Books, Impeachment of—Fraud.
- § 684. Specific Performance, Conversion, Demand.
- § 685. Shares Purchased by the Company.
- § 686. Individual Liability.
- § 687. Forfeiture.

§ 669. *Corporations*.—Mining corporations in California are *sui generis*; they are organized and carried on upon principles wholly different from banking, railroad, insurance, and other like commercial corporations having a subscribed capital stock. In mining corporations as ordinarily formed and conducted there is no agreement, either express or implied, that the stockholders shall pay up any particular stock; and there being no contract, they incur no liability.

In re South Mountain Con. M. Co., 8 Saw. 366.

The only liability of purchasers of stock in such corporations is the constitutional and statutory personal liability for their proportion of the debts and liabilities of the corporation, and the liability of their stock to assessment by the corporation.

In re South Mountain Con. M. Co., 8 Saw. 366.

§ 670. *Leading Cases on the Law of Ultra Vires*.—Corporations possess such powers, and such only, as the law of their creation confers upon them; and when created by public acts of the legislature, parties dealing with them are chargeable with

notice of their powers and the limitation upon them, and can not plead ignorance in avoidance of the defense of *ultra vires*.

Franklin Co. v. Lewiston Savings Institution, 68 Me. 43.

The leading case in England upon the subject of *ultra vires* is that of the East Anglian Railway Co. v. The Eastern Counties Railway Co., 11 C. B. 775. The opinion is given at length in Field's *Ultra Vires*. In that case it was held that a railway company incorporated by act of parliament can not, even with the assent of its shareholders, legally enter into a contract involving the application of any of its funds to purposes foreign from those for which it is incorporated. Any member of a corporation may by himself, in his own sole right, sue to prevent or put a stop to proceedings of any kind which are *ultra vires*.

Zabriskie v. Cleveland, C. & C. R. R. Co., How. 381.

As to parties, form of suit, and when it is necessary to sue in the name of the state by consent of the attorney general, see Green's *Brice's Ultra Vires*, 685-714.

In a case in the state of Nevada it was held that the "corporators" of a corporation are the stockholders, not the trustees; and that the board of trustees had no power to direct the filing of a petition to have the mining corporation adjudged a bankrupt.

Matter of the Lady Bryan M. Co., 2 Abb. 527.

The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or have paid a valuable consideration for it.

Savage v. Ball, 17 N. J. Eq. 142.

In an action to enforce a lien upon a mining claim in Utah, owned by a corporation organized under the laws of Great Britain, and for an injunction and receiver, the plaintiff had a decree for \$290,000 and interest. An injunction was granted and receiver appointed by the district court. On appeal the supreme court held that a corporation has no powers except such as are granted by its charter or by necessary implication; that the plaintiff was not an innocent party; that it was not necessary to show that he had actual knowledge that the corporation had no power; that he was bound to take notice of the director's powers, he being one of the incorporators and one of the first board of directors; that courts of equity have no power to dissolve corporations nor to appoint a receiver for a corporation in the absence of a statute conferring that power; and that where

by the terms of a contract one party is bound to do a certain thing, and the other can perform his part at his own option, the contract is not mutual nor binding on either party.

Irwin Davis v. Flagstaff M. Co., 2 Utah, 74; *Neal v. Hill*, 16 Cal. 145.

§ 671. *Implied Powers*.—It is a necessary incident of a mining corporation that it shall have power to contract and bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or make debts.

Wood Hydraulic H. M. Co. v. King, 45 Ga. 34.

Corporate Purposes and Powers—Smelting-works.—A corporation created "for the purpose of raising and smelting lead ores" has power to purchase smelting-works, with all the appurtenances which are necessary to carry on the business, and to assume a contract entered into by their vendors, providing means for transporting their ores when smelted to market.

Moss v. Averill, 10 N. Y. 449.

If in making such purchase some articles should be included (to wit, shanties, with stoves, etc.) which were not needed for the business of the corporation, the contract would not be thereby rendered void if the purchase altogether were made in good faith, for the sole purpose of prosecuting its legitimate business.

Moss v. Averill, 10 N. Y. 449.

Judicial Conclusions from Corporate Name—Injunction—Note—Ultra Vires.—Where a corporation organized in Illinois had borrowed large sums of money which it had used in Colorado territory, for which money it had given its notes, now held by Ballard and others, the court refuses to issue an injunction at the instance of a stockholder, to restrain the collection of such notes, on the ground of the corporation having exceeded its powers by operating beyond the state, because: 1. From the very corporate name of the company, "North Star Gold and Silver Mining Company," the complainant must have known that it was not intended to mine in the state of Illinois; 2. That in any event the contract was an executed one, and one of which the corporation had already received all the benefit, to which class of contracts, at such stage, corporations can not object that they were *ultra vires*; 3. That a stockholder who failed to apply for a restraining writ while the contract remained executory will be presumed to have assented to such contract.

Bradley v. Ballard, 55 Ill. 413.

Note for Corporate Purpose.—A corporation allowed by its charter to both raise and smelt galena, for several years confined itself to the business of mining, and its ores were smelted by contract; the company, determining to treat its own ores, bought the smelting-works, and the directors gave the notes of the company in payment: held, that the directors had authority to make such purchase, and the notes given therefor were valid.

Moss v. McCullough, 7 Barb. 279.

Corporations having power to purchase property can give promissory notes on such purchase, unless expressly prohibited by statute.

Moss v. Averill, 10 N. Y. 449.

Draft without Corporate Name.—A corporation is liable upon a draft drawn or accepted by a party authorized for that purpose, though the corporate name be not mentioned in such draft, if it be drawn or accepted under a name adopted by the corporation.

Conro v. Port Henry Iron Co., 12 Barb. 28.

Timber and Real Estate Incident to Mining.—The ownership of real estate is incident to the exercise of corporate mining franchises.

Whitman M. Co. v. Baker, 3 Nev. 386.

The holding of a timber claim treated as the exercise of the franchises of a corporation organized for mining purposes.

Whitman M. Co. v. Baker, 3 Nev. 386.

Outside Improvements Incident to Extended Mining Ratification.—The Rosie Lead M. Co., a corporation, purchased a large amount of property which had been previously used by the vendor in the business of washing and smelting lead ore, among which property was a house and lot, 50 acres of improved land, with several houses thereon, a school-house, thrashing machine, etc.: held, in an action on a note for the purchase money, that the purchase of such items in connection with the purchase of the smelting-works was not necessarily an excess of the power granted by the charter, and that such items might be incidentally employed in carrying on large mining operations.

Moss v. Rosie Lead M. Co., 5 Hill (N. Y.), 137; see *McCullough v. Moss*, 5 Denio, 567.

When a mining corporation allowed two of its officers to purchase property, and afterward received and operated the property: held, a ratification of the purchase, even if originally

made without authority, and that the corporation was liable on its note for the purchase money given by such officers.

Moss v. Rosie Lead M. Co., 5 Hill (N. Y.), 137; see *McCullough v. Moss*, 5 Denio, 567.

Saw-mill and Hotel.—A corporation owning a very large body of lands had power by charter to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country: held, that the building of a saw-mill and hotel in direct connection with its business was within its powers.

Watt's Appeal, 78 Pa. St. 370.

Power to Borrow Money.—A corporation, unless prohibited, has authority to borrow money to accomplish the purpose for which it was organized.

Union G. M. Co. v. Rocky Mt. Bank, 2 Col. 248; S. C., Id. 565; 1 Id. 531.

Power to Own Steamboat.—A corporation created for the purpose of mining and transporting coal, etc., has the power to purchase and use a steamboat for the purpose of its business in transporting and delivering coal.

Callaway M. & M. Co. v. Clark, 32 Mo. 305.

Supply Store.—A mining corporation may, under a general charter, keep a supply store, out of which to pay its employees in kind, instead of money.

Searight v. Payne, 2 Tenn. Ch. 175.

Flour-mill—Injunction.—If an iron company attempt to erect a corn and flour mill as an independent enterprise, and not as a mere incident to the iron-works, it is *ultra vires*.

Cherokee Iron Co. v. Jones, 52 Ga. 276.

And the discretion of a judge in enjoining the erection of such mill, the question of the intended use being one of fact, will not be interfered with.

Cherokee Iron Co. v. Jones, 52 Ga. 276.

Copper Company Trading in Iron.—*Assumpsit* by a corporation on a contract for the supply of iron rails to defendant, averring mutual promises. Plea, *non assumpsit*. On the trial the plaintiff proved the making of the contract; the defendant proved a charter incorporating plaintiffs for the purpose of trading in copper ore, but containing nothing as to trading in iron. No other charter was proved. There was no evidence that the contract proved was in any way ancillary to the trade in copper: held, that the contract not being made under seal,

and not being for the trading purpose for which plaintiffs were incorporated, did not bind plaintiffs, and that defendant was entitled to the verdict on the plea of *non assumpsit*, as there was no consideration for his promise.

Copper Miners of E. v. Fox, 16 Q. B. 227.

Corporation Taking Stock for Land.—A company owning land, and having power to sell, conveyed it, and received the stock of the mining company which purchased in payment: held, that such receipt of stock in payment was beyond the powers of the corporation, and the sale was void.

Watt's Appeal, 78 Pa. St. 370.

No Ratification of Ultra Vires.—The subsequent ratification by a corporation of acts of its agents not within the corporate powers will not render such void acts valid.

McCullough v. Moss, 5 Denio, 566.

§ 672. *Assumption of Debts.*—Horn loaned \$5,000 to six out of nine shareholders in the Volcano Water Company, taking their note, with interest at ten per cent. per month, and a mortgage executed by them, as individuals, on their interest in the company's ditch, etc. Subsequently he made a like loan of \$5,000, with like interest, and one T. at the same time made a similar loan of \$4,000. Later still, the corporation recognized these loans, and in consideration thereof, and a further loan of \$8,000 by Horn, executed to Horn note of \$21,900, and to T. a note of \$9,679, with mortgages upon the corporate property, the ditches, etc., the former notes and mortgages being canceled. Head, a creditor of the corporation, sues to set aside, as fraudulent, a decree foreclosing these last mortgages: held, that the recognition of these debts as those of the corporation, by the stockholders and corporate authorities, in the absence of any showing of fraud or suspicious circumstances, is *prima facie* sufficient to rebut an inference of fraud arising from the mere form of the original transaction, particularly as the court finds that the arrangement was not made to hinder, delay, or defraud creditors, Horn and T. supposed all along that the corporation was bound to them; that the money loaned went immediately into the treasury of the corporation, and was used for its purposes; that no credit was given the stockholders borrowing the money on the books; that it was regarded as one of the debts of the corporation when there seemed to have been no motive for fraud; and the loan was effected by those holding the largest portion of stock.

Head v. Horn, 18 Cal. 211.

Incorporators Transferring Possession of Claims.—Where the owner of a mining claim, previously located by themselves and others, become incorporated, and place the corporation thus formed in possession of the claim as their successor in interest, with the evident intention that whatever rights the unincorporated individuals had should pass to the corporation: held, that the title to the claim passed to the corporation as effectually as it would if the transfer had been accompanied by a conveyance in writing.

Table Mt. T. Co. v. Stranahan, 20 Cal. 198.

Assumption of Debts of Organizers.—A mining association carrying on its business and contracting debts, becoming incorporate to continue the same operations, the corporation may be liable for the debts already incurred by the incorporators, but not where the capital of the new organization is contributed only in part by the original mining association, the other part being added by new parties, unless there is an agreement by the corporate body to assume such debts.

Baxton v. Bacon M. Co., 2 Nev. 257.

Contract Made through the Stockholders.—A contract made by the stockholders of a mining corporation, as parties of the first part, with parties of the second part, by which the stockholders agree to assign their stock to trustees, to be by the trustees conveyed to the parties of the second part, upon payment by them of a certain sum of money to the parties of the first part, through the trustees, accompanied by a resolution of the board of directors of the corporation, authorizing their president to convey the mines to the parties of the second part, upon the payment of the money, is substantially as if the contract had been made with the corporation instead of the stockholders.

Gordon v. Swan, 43 Cal. 564.

Contract with Members.—A director or stockholder of a private (mining) corporation may trade with, borrow from, or loan money to the company of which he is a member, as other persons, the contract being without fraud or oppression.

Harts v. Brown, 77 Ill. 226.

§ 673. *Sales Presumed Lawful.*—A corporation organized for the purpose of owning ditches for the conveyance and sale of water possesses the power of selling and conveying all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance have a right to

assume, as against the corporation, that the sale was for a lawful purpose.

Miners' D. Co. v. Zellerbach, 37 Cal. 543.

Authorizing Sale.—Conferring authority to sell and convey the property of a mining company is the exercise of corporate power.

Gashwiler v. Willis, 33 Cal. 11.

Legal Title, where Vested.—The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders as such.

Wright v. Oroville M. Co., 40 Cal. 20.

Statutes of Mortmain.—A corporation holding more land than allowed by the law of its organization can not have its ownership of the excess attacked by trespassers or adverse claimants; such holding is valid, except against the state.

Whitman M. Co. v. Baker, 3 Nev. 386.

Corporate Property Seized on Suit against Individuals.—Sale of the property of a mining corporation upon attachment against certain persons sued as persons composing such company is void, the corporation having been no party to the suit, although subsequent to the return of the attachment plaintiffs had attempted to make it a party by amendment, adding its name as a defendant.

Collins v. Montgomery, 16 Cal. 398.

Substitution of Parties in Interest.—When a suit has been commenced in the name of a supposed corporation, which is afterwards shown to have no legal existence, it is within the power of the court of chancery to allow the parties who took the stock of the organization, and who advanced the proceeds which paid for the subject-matter of the suit (a quarry), to be added as plaintiffs.

Vermont M. & Q. Co. v. Windham Bank, 44 Vt. 489.

§ 674. *Torts and Frauds—Liable for Torts.*—A corporation carrying on the business of mining is liable for torts.

Kielley v. Belcher S. M. Co., 3 Saw. 437.

Timber—Trespass.—A mining corporation directing the cutting of timber on land not its own is liable in trespass the same as an individual.

Yahoola River M. Co. v. Irby, 40 Ga. 479.

Knowledge.—The same rule where knowledge is material (as

knowledge or means of knowledge of the limits of coal lands) is applicable to corporations as to individuals.

Burton Coal Co. v. Cox, 39 Md. 1.

Mismanagement Amounting to Fraud.—The directors of a corporation are liable at the suit of a shareholder for mismanagement so gross as to amount to fraud.

Watt's Appeal, 78 Pa. St. 370.

Fiduciary Relation of Officers to Stockholders.—The corporate authority is considered to have been conferred by the stockholders upon trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with the purpose to injure or destroy that interest.

Wright v. Oroville M. Co., 40 Cal. 20.

Fiduciary Parties Making Profit.—Promoters, directors, or agents of a company, are not permitted to make profit out of it in buying lands or dealing with it.

Rice's Appeal; Ahl's Appeal, 79 Pa. St. 168.

Fraud of Directors—Parties.—A fraud against a corporation by any or all of the directors may be redressed by an action in the name of the corporation.

Rice's Appeal; Ahl's Appeal, 79 Pa. St. 168; Simons v. Vulcan Oil Co., 61 Id. 202.

Action against Fraudulent Officers—Pleading—Nevada.—Sherman, a stockholder in a mining corporation, filed a bill against Clark, who united in himself the offices of superintendent of the mine, and secretary, trustee, and treasurer of the company, alleging that the latter had: 1. Seized and retained the books and ousted the president from his office; 2. Removed the office of the company without the consent of the board of trustees; 3. Wrongfully canceled the stock of another stockholder, and issued it to himself; 4. Deposited the funds of the company with a merchant, instead of in bank; 5. Refused to pay the company's debts out of said funds; 6. Was applying for a patent to the mining ground of the company; 7. Was working the mine without the control of the trustees or president, and was threatening to continue his unlawful acts, and praying an injunction to restrain him from interfering with the books or property, and from exercising any of the functions of superintendent, trustee, secretary, or treasurer: Held, 1. That the right to an office can not be tried upon application for injunction; nor if an officer be wrongfully removed, can he be restored by injunction; 2. That although an unauthorized and

injurious removal of the office of a company might be restrained, yet that such act when consummated can not be remedied by such proceeding; 3. That if stock had been wrongly canceled and reissued, its transfer might be enjoined, but only upon a showing of the illegality of the issue and proposed transfer; 4. That, though the deposit of the company's funds with an individual was out of course, yet it must further be shown that the individual is not a safe custodian; 5. The refusal to pay the just debts of the company is not sufficient in and of itself to show neglect of duty without a showing as to his authority and duty to pay; 6. That the fact of applying for patent is presumably beneficial to the company, it not being shown that he applied in his own name, and no other facts showing injury to the company being alleged in connection with such application; 7. And that the allegation as to his working the mine without control of the board raises no presumption that he was working the premises to the injury of the mine or the damage of the company.

Sherman v. Clark, 4 Nev. 140.

Directors Speculating with Funds—Parties.—Where the directors of a mining company employed the funds of the company in the purchase and sale of various stocks: held, a palpable violation of duty which rendered them personally liable to make good the loss.

Robinson v. Smith, 2 Paige, 222.

Held, further, that in a suit to compel them to account, the corporation was a necessary party either as complainant or defendant.

Robinson v. Smith, 2 Paige, 222.

Breach of Trust by President.—The president of a corporation is a trustee for the company, and can not speculate in its funds, nor make any gain, profit, or advantage from their use. An assignment of its property to secure his personal debts is a breach of trust.

Conro v. Port Henry Iron Co., 12 Barb. 27.

Purchase by Director.—A director in a corporation at the time a sale of part of its property was contemplated and made, and who actively participated in all the measures tending to its completion, and had full knowledge of all the circumstances attending its progress, is not competent to become a purchaser of such property, and the sale to him can not be upheld if resisted by the corporation.

Hoffman S. C. Co. v. Cumberland C. & I. Co., 16 Md. 456.

Sale of Entire Assets.—Conceding it to be unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment thereof the stock of the grantee to be distributed among its own stockholders, yet if such sale is made, and the contract fully executed, the corporation itself can not recover back the property sold, or set aside the contract on account of its illegality.

Miners' D. Co. v. Zellerbach, 37 Cal. 544.

Sale where the Sole Capital is the Property Purchased.—Rhodes constructed a private railroad to his own mines through an alley on the line of an incorporated railroad company, with their consent; he was enjoined from using it, and ordered to remove the rails, etc. He procured the incorporation of himself and six others as a railroad, coal, and oil company, with a capital of \$100,000; they were authorized to buy any railroad partly or wholly completed, and damages were to be ascertained, etc., according to the general railroad laws. The company was organized before any stock was taken, and Rhodes sold to them his railroads, mines, etc., for \$100,000, payable in the stock of the company, which had no other assets than the property sold by Rhodes. The company relaid the road, and operated it with locomotives, etc. Held, 1. That Rhodes was the owner after the organization and his sale to them, as he had been before; 2. The road sold by Rhodes having been built without authority of law, and being a nuisance, the act of incorporation did not authorize the company to purchase such road.

McCandless' Appeal, 70 Pa. St. 210.

§ 675. *By-laws, Elections, Meetings, Dissolution—By-law—Necessary Expenses.*—A by-law restraining trustees from incurring a deed to exceed \$10,000 construed to prevent their making assessments beyond that sum to pay the "legal and proper expenses."

Sullivan v. Triunfo G. & S. M. Co., 29 Cal. 585.

The board of trustees of a corporation formed for the purpose of carrying on mining have the power to levy and collect, for the purpose of paying the proper and legal expenses of the company, assessments exceeding \$10,000, even though the by-laws provide that the trustees shall not have power to incur indebtedness exceeding \$10,000, and the indebtedness then incurred and existing exceeds that amount.

Sullivan v. Triunfo G. & S. M. Co., 29 Cal. 585.

By-laws—Irregularity.—Where what purported to be the by-laws of a California mining corporation, though adopted by the stockholders instead of the trustees, appeared to be the only by-laws ever adopted by the corporation, were found duly recorded in the books kept by the trustees, and had been used and acted upon as the by-laws by both trustees and stockholders for more than ten years, and ever since their adoption: held, that they were to be considered the regular by-laws of the company.

State v. Curtis, 9 Nev. 325.

Elections—By-laws.—If the day provided for an election in the by-laws has passed, it is still the duty of the trustees to call the meeting within a reasonable time; and a meeting called at such later period is valid.

Flagg v. Lady Bryan M. Co., 4 Nev. 406; State v. Wright, 10 Id. 167.

Compliance with Charter Presumed.—Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transaction between the company and other parties, that the requirements of the statute have been complied with.

Colonial Bank of Australasia v. Willan, L. R., 5 P. C., 417.

Nul Tiel Corporation—Balloting.—Where, in consequence of all the stock of a mining corporation being owned by only three persons, they did not practice taking formal ballots for directors, but proceeded informally, and continued to re-elect the same officers: held, that they did not cease to be a corporation *de facto*.

Vermont M. & Q. Co. v. Windham Bank, 44 Vt. 489.

Election of Trustee.—The election of a trustee of a mining corporation is a corporate act, and must be conducted in the manner required by the charter.

State v. Curtis, 9 Nev. 325.

Where the statute under which the corporation was organized required a majority of the trustees to do a corporate act, a by-law authorizing a vacancy in the board of trustees to be supplied by less than a majority was held contrary to the charter, and void.

State v. Curtis, 9 Nev. 325.

Under the California statute regulating mining corporations, the manner of the election of a trustee may be regulated by the

by-laws, but the substance must be in conformity with the statute.

State v. Curtis, 9 Nev. 325.

Elections.—An election at which all the stockholders are present, but a portion decline to participate, the same being held without the action of such presiding officer as the by-laws prescribed, is not a legal election.

State v. Pettineli, 10 Nev. 141.

It is the legal right of any stockholder of a mining corporation that an annual election of trustees be held, without regard to the number of shares such stockholder may have.

State v. Wright, 10 Nev. 167.

Meetings, how Called.—When the by-laws provide that meetings of stockholders shall be called by the board of trustees, a meeting called by the president of the company is illegal.

State v. Pettineli, 10 Nev. 141.

But such a meeting might bind by consent of all the stockholders.

State v. Pettineli, 10 Nev. 141.

Power to Convene Directors.—The president of a mining corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation.

Union G. M. Co. v. Rocky Mt. Nat. Bank, 1 Col. 532; S. C., 2 Id. 248, 566.

Correction of Minutes.—A corporation may introduce parol evidence to show that a resolution of its board of trustees, spread upon the minutes of its proceedings, does not express correctly the proposition which was voted by the board.

Gilson Quartz M. Co. v. Gilson, 51 Cal. 341.

Successors—Practice.—A creditor of a corporation, the whole stock and property of which is transferred to its successors, which takes it subject to the debts of the first corporation, and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone.

Barksdale v. Finney, 14 Gratt. 339.

Dissolution—Insolvency—Non-user.—A mining company can not be dissolved by insolvency or non-user; those are only grounds upon which courts may base a decree of dissolution.

Nimmons v. Tappan, 2 Sweeny, 652.

§ 676. *Obligations and Penalties*.—Where the charter of a

corporation required its officers annually, between the first and twentieth of January, to make and publish a certain report: held, that a company incorporated in May, 1867, was bound to make and publish such report in the following January.

Union Iron Co. v. Pierce, 4 Biss. 327.

Annual Report—Explanatory Statute Void.—And an act of the legislature declaring the meaning of the section under which such annual report was required and personal liability thereunder attached is utterly void.

Union Iron Co. v. Pierce, 4 Biss. 327.

Duty to Sell Assets and Pay Debts.—Where the lands of a coal company, its shafts, railroad tracks, rails, and mining rights were sold under a deed of trust given to secure the payment of its bonds, and brought a sum sufficient to pay the bonds, and the company owed other debts, it was held that it was not only the right but the duty of the directors to sell the remaining property to meet the other liabilities of the company, and that they might authorize its sale at auction by the party selling under the trust deed.

Harts v. Brown, 77 Ill. 226.

Issuing Currency Notes—Proof of Office.—In a suit for a penalty against a mining corporation for illegally issuing notes, the official character of the officer signing such notes may be sufficiently proved by showing that he acted as such officer *de facto*.

McGargell v. Hazelton Coal Co., 4 Watts & S. 424.

Issuing Corporate Paper to Circulate as Money.—An act to prevent mining and other corporations from issuing bills or notes, "upon loans," or to circulate as money, construed to not prevent a corporation issuing its notes in the usual course of business for money borrowed by it, holding that the word "loans" in the statute prohibited issuing of notes only where the corporation was the lender.

Magee v. Mokelumne M. Co., 5 Cal. 258.

Proceedings Outside of State.—Although a corporation, as such, can do no corporate act out of the limits of the state granting its charter, yet its agents and officers may bind it by contracts and engagements made in other states, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the state chartering the corporation.

Wood Hydraulic H. M. Co. v. King, 45 Ga. 34.

§ 677. *Organization—Taking Grant before Organization.*—A corporation may take real estate by grant before it has such an organization, by the election of officers, etc., as to enable it to enter upon the transaction of general business.

Vermont M. & Q. Co. v. Windham Bank, 44 Vt. 489.

Cause of Action Arising before Incorporation.—Thompson contracted to buy an interest in two oil wells; afterward an oil company was incorporated, to which Thompson transferred his interest; the vendors in the mean time receiving and selling the oil. By agreement the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company: held, that these facts constituted an original contract between the vendors and the company; and that *assumpsit* could be maintained by the company in its own name for oil received between the time of the contract and the incorporation.

Snow v. Thompson Oil Co., 59 Pa. St. 209.

Agreement between Organizers.—Where two brothers, contemplating the formation of a private corporation, purchased certain coal lands and mining rights, and agreed, when the purchase was made, that they were to have an equal interest in the stock of the company, and to make equal payments on account of the purchase and for carrying on the business; and after the incorporation one of them advanced various sums of money in payment of drafts of the corporation, and in taking up its indebtedness, for which he was credited upon the books of the company: held, in a suit against the corporation to recover such advances, that the agreement was intended only to bind each brother to advance equal amounts as loans, and not as donations, and even if this were not so, that the corporation could not set up the agreement as a defense, as it was no party thereto; the court could only look to the legal liabilities of the company.

Merrick v. Peru Coal Co., 61 Ill. 472; S. C., 79 Id. 113.

Contract as to Organization—Equities between Corporators Disregarded.—In a suit by an individual against a corporation for money alleged to be due from the defendant to the plaintiff, the defendant sought to prove, that before the organization of the corporation defendant, a contract was entered into between the plaintiff and his brother, that they would advance equal amounts for the purchase of property and carrying on the business of the corporation; that they would purchase and hold

stock in the corporation in equal amounts; that if one advanced more than the other, the one advancing the lesser sum should pay the other such sum as would make their advances equal; and that the money sued for was advances made by the plaintiff in pursuance of this agreement: held, that the corporation was not a party to this agreement, and had no concern with it; that the court could look alone to the legal liabilities of the corporation, without regard to the equities between the plaintiff and his brother, and that the evidence was properly excluded.

Peru Coal Co. v. Merrick, 79 Ill. 112; see *Merrick v. Peru Coal Co.*, 61 Id. 472.

Organizer Conveying Mine—Resulting Trust.—When one conveys all his interest, say one hundred and thirty-seven and one half feet, in a mining company's claim, to trustees to form a corporation, in trust that he is to receive shares in the corporation equivalent to his number of feet in the claim, and afterward conveys the same feet to another party with warranty of title, the last grantee takes an equity, and is entitled to the shares to be issued in lieu of these feet. When, in such case, the company had issued the stock to the last grantee, or the party equitably entitled thereto, the court should not compel them to issue to another, especially when that other can only show his claim by proving his own fraud.

O'Mera v. North American M. Co., 2 Nev. 113.

Legal Existence.—Corporations in California have a legal existence from the date of filing their certificate of incorporation in the office of the county clerk.

Mokelumne Hill Co. v. Woodbury, 14 Cal. 424.

Commencement—First Meeting.—A corporation exists under the general statutes, chapter 61, section 1, so as to be able to contract debts as soon as its first meeting has been held and its officers have been chosen, if not immediately upon the signing of the articles of association.

Haws v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

Proof of Organization or Charter.—To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown.

Abbot v. Omaha Smelting Co., 4 Neb. 416.

The existence of a corporation (mining), founded under a general statute requiring certain acts to be done before the cor-

poration can be considered *in esse*, when denied, must be proved by showing at least a substantial compliance with the requirements of the statute.

Mokelumne Hill Co. v. Woodbury, 14 Cal. 424.

But as to such acts as are not made prerequisite to the assumption of corporate powers, the corporation is responsible only to the government in a direct proceeding for forfeiture; and of this class is the fact that a duplicate certificate has not been filed in the office of the secretary of state.

Mokelumne Hill Co. v. Woodbury, 14 Cal. 424.

Filing Certificates, Statutory Organization.—The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed in section 1 of the act for the incorporation of manufacturing corporations, and must file the same in the recorder's office of the proper county, and a duplicate thereof in the office of the secretary of state. Unless these steps have been taken, the corporation has no legal existence.

Indianapolis Furnace M. Co. v. Herkimer, 46 Ind. 142.

The statute of Nevada requiring certificates of incorporation of mining companies to state the names of trustees who shall act for the first six months, implies necessarily that a new election must be held at the expiration of such period, or within a reasonable time thereafter, notwithstanding the section allowing the time of annual election to be fixed by the by-laws.

Flagg v. Lady Bryan M. Co., 4 Nev. 401.

Certificate, not Acknowledged.—The certificate of incorporation of a company claiming in good faith to be a corporation under the laws of this state, and doing business as such corporation, is admissible in evidence in a private suit to which the company is a party, as evidence of its right to act as a corporation, although it is not acknowledged by all the corporators.

Dannebroge G. Q. M. Co. v. Allment, 26 Cal. 286.

Organization—Nul Tiel Corporations.—As to the plea of *nul tiel corporation* where a corporation has not complied with the statutory requirements as to organization, and the burden of proof in such case, see Indianapolis F. & M. Co. v. Herkimer, 46 Ind. 142.

Collateral Attack.—The right of a company doing business as a corporation *de facto*, and claiming in good faith to be a corporation under the laws of this state, to act as a corporation, can

not be inquired into collaterally in a private action to which the corporation *de facto* may be a party.

Dannebrogge G. Q. M. Co. v. Allment, 26 Cal. 286.

If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or specific laws, the question is one of law, and it is for the state alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises.

Doyle v. Peerless Petroleum Co., 44 Barb. 239.

Nul Tiel Corporation.—It can not be shown in a collateral proceeding that a corporation (mining) has forfeited its charter.

Crump v. U. S. M. Co., 7 Gratt. 352.

§ 678. *Defective Charter—Legislative Recognition*.—Defects in the proceedings to incorporate a company are cured by the subsequent recognition of the existence of the corporation by the legislature of the state under whose authority it claims to have been incorporated.

Kanawha C. Co. v. Kanawha & O. C. Co., 7 Black, 391.

When a company had attempted an organization for both mining and manufacturing purposes, and their charter had been subsequently recognized by the legislature by the passage of an act amendatory thereto: held, that such act of the legislature cured the defect, if any existed, and rendered the incorporation valid *ab initio*.

Basshor v. Dressel, 34 Md. 503.

Regularity of Proceedings.—It is not incumbent on a person lending money to a joint-stock company to ascertain that all the proceedings of the company and its shareholders *inter se* have been strictly regular.

Bank of Australasia v. Willan, L. R., 5 P. C., 418.

Estoppel of Trustees as to Organization.—The trustees of a corporation who signed the certificate of incorporation and accepted the office of trustee are estopped from denying the validity of the act of incorporation.

Parrott v. Byers, 40 Cal. 614.

Void Charter.—The certificate of a ditch and mining company, which does not set forth the name of the city or town and county in which its principal place of business is to be located, does not establish the existence of a corporation.

Harris v. McGregor, 29 Cal. 124.

Name.—Instance of the exercise of mining franchises under a corporate name, indicating other purpose, *e. g.*, “The Stanhope and Tyne Railway Company.”

Ex parte Harrison, 3 Mont. & Ayr. 506.

Misnomer.—The omission of the word “mining” in the name of the “Sierra Buttes Quartz Mining Company,” in an assessment roll, held, not a fatal discrepancy.

People v. Sierra Buttes M. Co., 39 Cal. 511.

Assumption of Corporate Name—Usurpation of Franchises.—To *assumpsit*, charging the defendants as partners in a company called the Anglo-American Gold Mining Association, upon a contract entered into with the plaintiffs by three individuals (one of them being one of the defendants) as agents for and on behalf of the company, one of the defendants, J. L. H., pleaded that the company or association in the declaration mentioned was an illegal company, presuming to act as a corporate body, without any authority by charter or act of parliament, and also presuming to raise transferable and assignable stock and capital, to an unlimited amount, transferable at the discretion of the holders, to the common nuisance of the subjects of the queen; and a further plea, containing similar allegations, and adding that at the time of the formation of the company no gold mines had been discovered, and that the objects of the company were fanciful, visionary, and fraudulent, tending to the common nuisance, etc., of the queen's subjects: held, that the mere circumstance of the defendants having called themselves “The Anglo-American Gold Mining Association,” and professing to have stock transferable at the will of the holder, subject only to certain regulations as to registering transfers and proof of title, did not show the association to be a nuisance and public grievance at common law.

Harrison v. Heathorn, 6 Scott N. R. 735; 12 J. C. P. 282.

§ 679. *Reorganization—New Company.*—The stockholders of one or more corporations may form a new company, and the property of the old corporation may be conveyed to the new corporation.

Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.

New Company Succeeding to Liabilities.—H. owns or controls all the stock of the B. corporation, and he contracts with third person to obtain a charter for another corporation, of which they shall be the incorporators, and to transfer to the new corporation all the stock, and convey all the real estate and other

property (except slaves) of B., as also some real estate of his own. The charter is obtained, and the stock is transferred, but there is no conveyance of real estate; but the new corporation takes possession of it, and holds it as its own. The new corporation is the successor of B., and takes the property, subject to pay the debts of the corporation of B., to the value of the property received.

Barksdale v. Finney, 14 Gratt. 338.

Consolidation.—A person once entitled to stock can only be deprived of it by transfer, or by such forfeiture for non-payment of lawful assessments as is authorized by law; and a stockholder in one of two mining companies which are consolidated becomes, by the consolidation, under the statute (Comp. Laws, 1871, sec. 2892-2895), a stockholder in the new company.

People v. Minong M. Co., 33 Mich. 2.

A Manufacturing Corporation.—A corporation organized under the general statutes, chapter 61, for the purpose specified in the articles of association, of refining and preparing for use oil, coal, and other minerals, is a manufacturing corporation within the meaning of the statute of 1862, chapter 218, without regard to what other purposes are also specified.

Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

Seal—Trading Corporation.—An incorporated mining company contracted with an engineer for the erection of a pumping engine and machinery for use in a colliery. The contract was not under seal: held, that the rule requiring a corporate seal does not apply to trading corporations contracting with regard to the purpose for which they are formed. That the present was such a case, and the contract was valid.

South of Ireland C. Co. v. Waddle, L. R., 4 C. P., affirming S. C., 3 Id. 463.

Frostburg Company Charter.—Charter of the Frostburg Coal Company of Maryland, construed.

Frost v. Frostburg C. Co., 24 How. 278.

§ 680. *Officers and Agents—Acceptance of Office.*—When it is shown that a person has been elected a trustee of a corporation, his acceptance will be presumed.

Nimmons v. Tappan, 2 Sweeny, 652.

Officers de Facto.—The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or had paid a valuable consideration for it.

Savage v. Ball, 17 N. J. Eq. 143.

Forcible Intrusion.—A forcible intrusion will prevent an officer being considered as an officer *de facto* of a mining corporation.

State v. Curtis, 9 Nev. 325.

President Purchasing Realty—Ditches.—Where a corporation is engaged in the business of conveying water through ditches for sale to miners, a purchase of additional ditch property, with a view of extending the operations of the company, is not a matter within the ordinary course of business of such corporation, and its president, as such, has no authority to bind the corporation by a contract for such purchase.

Blen v. Bear River & A. W. & M. Co., 20 Cal 602.

President, Sale by.—The president of a corporation is not, *ex officio*, the agent of the corporation to sell property, and unless appointed its agent to sell, his representations are not binding upon the company.

Crump v. U. S. M. Co., 7 Gratt. 352.

Assignment to President.—A corporation having operated iron-works assigned the same to its president: held, that it continued liable to all who had previously dealt with it through its agents, and who continued to deal in the same way without actual notice.

Conroy v. Port Henry Iron Co., 12 Barb. 27.

Lease to President, Void.—Where a corporation, incorporated for the purpose of manufacturing iron in all its branches, in pursuance of a resolution of its stockholders, made a lease of its iron-works and all its property to its president, who owned a majority of its stock, for a period of two years and a half, and the business of the corporation was carried on by the lessee in the same manner as before the lease was given, without notice to persons dealing with it of any change, until the failure of the lessee and his assignment of the property for the benefit of creditors: held, that the lease was void for two reasons: 1. Because it was the act of the stockholders, and not of its directors, by whom alone the corporation could act; 2. Because the effect of such lease was to suspend the ordinary business of the corporation for the period of more than one year, and thus amounted to a surrender of its rights, privileges, and franchises, within 2 R. S. 463.

Conroy v. Port Henry Iron Co., 12 Barb. 27.

Presumptive Good Faith of President—Letters.—To establish that S. was the agent of the corporation defendant, the plaintiff offered letters written by the president of the corporation to S., in

which he was addressed as superintendent of the company, and the affairs and prospects of the company were discussed. It was shown that the president, for a considerable time before this, and afterward, had assumed general authority in the affairs of the corporation, the control of its property, payment of its debts, and the management of its law-suits: held, that the letters were admissible without direct evidence of authority to write them, the presumption being indulged that the president was acting the part of a faithful executive, and with the knowledge and assent of the corporation.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., Id. 531.

President Undertaking to Call Meeting—A Contract.—An undertaking of the president of a corporation to bring before the board of directors, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president, and the corporation is bound to consider the demand at the time specified.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

Declaration of President.—Distinction between declarations of president of a company when acting as authorized agent of the company, and when not so authorized.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

Authority of President to Ratify Contracts.—The superintendent of a mining company has no authority, by virtue of his office merely, to borrow money, on the credit of the corporation. The president of the corporation has no authority, as such, to undertake in the corporate name, for the repayment of such an unauthorized loan.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

President—Debts Incurred by.—The president of a private corporation has no authority, by virtue merely of his official position, to make contracts binding the corporation, except in relation to matters arising in the ordinary course of the business of the corporation.

Blen v. Bear River & A. W. & M. Co., 20 Cal. 602.

Board of Trustees.—The trustees of a corporation can only bind it when they are together as a board acting as such.

Hillyer v. Overman S. M. Co., 6 Nev. 51.

The corporate powers of a corporation can be exercised by the trustees only when duly assembled and acting as a board.

Gashwiler v. Willis, 33 Cal. 11.

Powers of Board of Trustees.—The board of trustees of a corporation may control the corporate property within the limit that the law has assigned to the exercise of corporate authority.

Wright v. Oroville M. Co., 40 Cal. 20.

Power of Trustees Exclusively.—Where the corporate powers are vested in a board of directors or trustees, the proceedings of a stockholders' meeting can not be shown to establish a disavowal by the corporation of the acts of one who, without authority, has assumed to contract for it. The delegation of power to the trustees is exclusive.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

Trustees, Deed of.—The individuals who are the trustees of a corporation, in their official character as trustees, when not acting as a board, have no authority, independent of that conferred by the corporation, to execute a deed of the corporate property.

Gashwiler v. Willis, 33 Cal. 11.

Trust Relationship of Officers.—Directors and managers of corporations and other companies are within the rule which governs the dealings of trustee and *cestui que trust*, and agent and principal; such directors and managers are in fact trustees and agents of the bodies represented by them.

Cumberland C. & I. Co. v. Parish, 42 Md. 598.

In the case of directors of a corporation, there is an inherent obligation implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty.

Cumberland C. & I. Co. v. Parish, 42 Md. 598.

Director a Trustee.—A director of a corporation is an agent or trustee for the stockholders, and as such is held to the obligations of fiduciary relations.

Cumberland Co. v. Sherman, 30 Barb. 553.

Directors, Power in.—The directors of a corporation, unless expressly restrained either by the charter or the by-laws, may exercise the ordinary powers of the corporation.

Wood Hydraulic H. M. Co. v. King, 45 Ga. 34.

Authority of Directors to Purchase.—What is sufficient evidence of authority of directors of a mining company to purchase real estate, considered.

Moss v. McCullough, 7 Barb. 279.

Contract of Director with.—A director of a corporation is not prohibited from lending it moneys when needed for its benefit and the transaction is open; nor is his purchase of its property at a fair sale, under a trust deed securing his loan, an invalid transaction.

Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

Removal of Directors.—One who is named as a director in the articles of incorporation, and who has acted as such, can not be removed by parol, or by individual action of other directors, and the proceedings by the board without notice to declare the office vacant are without jurisdiction.

People v. Minong M. Co., 33 Mich. 2.

Promise of Officer to Pay Corporate Debt—Pleading—Personal Liability.—Evans declared against a corporation and its president and secretary, jointly, but showed no evidence of a joint contract by the defendants, nor of any relation, except that the plaintiff having mined for the company, the president told plaintiff he would see him paid for it: held, that the action could not be maintained; that the promise of the officer, if it created any contract at all, made a contract of suretyship, and created no joint liability upon the contract of the corporation.

Youghioghenny Shaft Co. v. Evans, 72 Pa. St. 331.

Held, further, that the personal liability of stockholders could not be enforced in *assumpsit*.

Youghioghenny Shaft Co. v. Evans, 72 Pa. St. 331.

Compensation to Officers—Usage.—In an action against a mining corporation by one of its members upon an implied contract for the value of his services as secretary, it is competent for the defendant to show that by the usage and custom of the corporation, no compensation was chargeable for such service.

If such usage existed, plaintiff's position as a member and officer of the company would *prima facie* charge him with a knowledge of its existence, and the inference would be that he accepted the office and performed its duties without expecting compensation.

Fraylor v. Sonora M. Co., 17 Cal. 594.

Salary to President.—Unless provision is made in the by-laws or resolutions for compensation to the president of a mining corporation, he can not recover for his services.

Merrick v. Peru Coal Co., 61 Ill. 472; S. C., 79 Id. 113.

Extra Pay to Secretary.—The secretary of a private mining

corporation, at a fixed salary, can not recover extra pay for services in that capacity.

Carr v. Chartiers Coal Co., 25 Pa. St. 337.

Promissory Note—Director.—The authority of a director of a mining company (partnership) to draw a bill of exchange or promissory note, binding upon his partners, is not implied, and must be proved.

Dickinson v. Valpy, 10 Barn. & Cress. 128; S. C., 5 Man. & R. 126.

Note by Superintendent.—The superintendent of a mining corporation can not bind his company by a promissory note where he is not authorized by his company to make notes.

Carpenter v. Biggs, 46 Cal. 91.

Overdraft by Agent—Estoppel.—A corporation whose agent has obtained money by overdraft at a bank, and applied it to the purpose of the company, is estopped to deny its power to borrow money in an action by the bank to recover the loan.

Union G. M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

Agent may Make Affidavits.—Where an affidavit is required in support of legal proceedings, the agent of a mining corporation is a proper party to make the same on behalf of his principal.

Barrett M. Co. v. Tappan, 2 Col. 124.

Notice to Agents.—Notice to the agent of the corporation is notice to the corporation itself.

Conro v. Port Henry Iron Co., 12 Barb. 28.

Notice through its Officials.—Notice to the president of a mining corporation of the acts of one who, without authority, has assumed to act for it, is notice to the corporation itself, and when sought to be made liable through a ratification by silence, it will not be heard to say that the president in receiving the notice was acting in his individual capacity, and not officially.

Union M. Co. v. Rocky Mt. Bank, 2 Col. 248, 565; S. C., 1 Id. 531.

Ratification of Officer's Accounts.—A mining corporation which accepts a person as treasurer, and ratifies and audits his accounts, in which a balance appears against the corporation, is bound by the admission as a private person would be under the same circumstances.

Wood Hydraulic H. M. Co. v. King, 45 Ga. 34.

Account—Usury Money Credited to Treasurer.—Interest beyond the legal rate paid by the treasurer of a mining corporation, under its authority, or subsequent ratification, may be recovered by him from the company.

Wood Hydraulic H. M. Co. v. King, 45 Ga. 34.

California Acts of 1850 and 1872.—The act of March 21, 1872, entitled "An act supplemental to an act entitled an act concerning corporations, passed April 22, 1850," providing for the removal of the board of directors of a corporation, applies to mining corporations.

In re Boston M. & M. Co., 51 Cal. 624.

The language of the act being plain, its title can not be used to restrain that language.

In re Boston M. & M. Co., 51 Cal. 624.

§ 681. *Stock and Stockholders—Capital Stock—Distributing to Stockholders.*—Any arrangement which will have the effect to withdraw the capital of an incorporated company and turn it over to the stockholders, except in the manner prescribed by law, is in violation of that provision of the statute which forbids the trustees to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving credit.

Martin v. Zellerbach, 38 Cal. 300.

By capital stock, the statute intends the capital of the corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities.

Martin v. Zellerbach, 38 Cal. 300.

Discoverers Incorporate—Error in Issue of Stock—Measure of Damages.—Where the locators of a mining claim and their assigns consolidate their interests, and conveyed to the trustees of a corporation, which corporation was to issue shares of stock to the parties who thus conveyed in proportion to the number of feet each had conveyed, and an error was made in the distribution of shares, the discoverer not being allowed for his additional claim, so that the others received more and the discoverers received less than their respective claims in feet entitled them to: held, that the corporation was bound to purchase shares and transfer them to the discoverer, or pay him, unless the full *quota* had been issued; held, further that the shares wrongfully issued to the other parties in excess of their proportion were not invalid; held, also (*obiter*), that the measure for damages would be the value of the stock at date of decree, this being a case of mistake, and not the act of a willful wrong-doer. Where the ownership of the additional claim by the discoverer at the time of such consolidation is admitted, it would require clear and

positive evidence to show that he waived or relinquished his right thereto, or allowed it to be merged on equal terms with the claims of others who had no additional rights as discoverers. And where in such case one witness declares that the discoverer assented to the division of his additional claim among the company, and another testified that he objected to such division, it was held his assent to such division was not proved.

Smith et al. v. N. A. Min. Co., 1 Nev. 424.

Stockholder—Organization.—Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation.

Indianapolis Furnace & M. Co. v. Herkimer, 46 Ind. 142.

Relations of Stockholders to Directors and Corporation.—Directors are but the agents of the company, and have power to act only for the interest of the company, not against it.

Simons v. Vulcan Oil Co., 61 Pa. St. 202.

The shareholders constitute the company, and the acts of the directors may be inquired into at their instance.

Simons v. Vulcan Oil Co., 61 Pa. St. 202.

Personal Liability for Calls.—The act of July, 1863, for incorporating mining companies, does not make a transferee of stock personally liable to pay assessments.

Franks Oil Co. v. McCleary, 63 Pa. St. 317.

No implication of a personal promise to pay assessments arises against the transferee, nor does his voluntary payment of one assessment imply a promise to pay the others.

Franks Oil Co. v. McCleary, 63 Pa. St. 317.

The company can indemnify themselves only by a sale of the stock and pursuit of the original subscribers.

Franks Oil Co. v. McCleary, 63 Pa. St. 317.

Shares Transferable by Delivery—Usurpation of Franchises.—A company was established in 1835 for the purpose of advancing money to mine owners on the produce of mines in Mexico, upon terms contained in the prospectus, which placed its affairs under the management of individual directors, but contained no provision as to the transfers of shares. The certificate of shares purported to give the holder a title to the shares, which accordingly were treated as transferable by delivery of the certificates: held, that the having shares transferable by delivery was not such an assumption of a corporate character as to make the company illegal.

In re Mexican & S. A. Co., 4 De G. & J. 544; 28 L. J. Ch. 769.

Canceling Shares.—It is not *ultra vires* for a mining company to agree to cancel the shares of a member if such power is provided for in the articles of the association.

Marshall v. Glamorgan Iron & C. Co., L. R. 7 Eq. 129.

Surrender of Stock.—A corporation can not reduce its capital stock, under the provisions of chapter 134, section 6, general statutes, by purchasing the shares of any stockholder. In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock.

Currier v. Lebanon Slate Co., 56 N. H. 262.

Equity Jurisdiction between Corporation and Stockholder.—In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders.

Wright v. Oroville M. Co., 40 Cal. 20.

Debts Contracted while Stock Held—Practice.—Where the stockholders of a lead-mining company were made by their charter individually liable for the payment of debts of the corporation: held, that such liability extended only as to each stockholder to such debts as were contracted while he was a stockholder.

Judson v. Rossie Galena Co., 9 Paige, 598.

Held, further, that creditors whose debts were contracted at different periods of time have no common interest in the individual liability of different stockholders, and can not litigate their claims against such stockholders in a single suit.

Judson v. Rossie Galena Co., 9 Paige, 598.

Held, further, that each stockholder being severally liable, the stockholders are not entitled to an injunction compelling the creditors to appear and prove their debts under the decree in the first suit.

Judson v. Rossie Galena Co., 9 Paige, 598.

§ 682. *Stock Sold, Pledged, Donated, Lost, or Stolen—Certificate—Purchaser in Good Faith.*—A stock certificate, issued by a corporation having power so to issue, is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good

faith has a right to rely thereon, and to claim the benefit of an estoppel in his favor as against the corporation.

Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

Gift.—A gift of mining stock is not perfect, nor does any interest pass to the proposed donee, until there has been a delivery by the donor and an acceptance by the donee.

Dow v. Gould & Curry S. M. Co., 31 Cal. 630.

Secret Trust.—Where stock has been pledged by the holder in breach of a secret trust, the *cestui que trust* must advance or tender the amount secured by the pledge before he can assert any claim to the stock.

Thompson v. Toland, 48 Cal. 99.

Trustee.—The addition of the word "trustee," in a certificate of stock to the name of the person to whom it is issued, does not show that said person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same.

Thompson v. Toland, 48 Cal. 99.

Act of Bankruptcy by Pledgee.—A pledge of mining stock amounting to a fraud under the bankrupt act is nevertheless valid against a rightful owner of the stock who placed it in the power of the pledgor to use it as his own.

Thompson v. Toland, 48 Cal. 99.

If a sale of mining stock pledged as security for money is made without notifying the pledgor to make his bargain good, and without sufficient notice of time and place, still if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale.

Child v. Hugg, 41 Cal. 519.

Pledge Sale in Gross.—Different parcels of stock pledged as collateral at different times, for the security of different debts, can not be sold in gross for the satisfaction of the entire amount for which judgment was given.

Mahoney v. Caperton, 15 Cal. 314.

Purchasing with Notice of Pledge.—A party purchasing, at sheriff's sale, stock of a mining company, knowing the certificates to have been previously hypothecated, is chargeable with notice of the fact, and takes subject to the claim of the pledgee.

Weston v. Bear River Co., 6 Cal. 245.

Pledge.—The pledgee of mining stocks, upon a redemption of

the pledge, is not obliged to return to the pledgor the identical certificates pledged, but may return certificates corresponding to those received.

Thompson v. Toland, 48 Cal. 100.

Margin—Delivery—Rule of Board.—In an action brought to recover a sum of money alleged to be due as the first payment or margin on a written contract for the sale of stock by a member of the board of brokers, to be delivered to the buyer in thirty days, if the contract acknowledges the receipt of such first payment, the plaintiff may give evidence of what the custom of the board of brokers was with regard to making and delivering such contracts, for the purpose of accounting for the delivery of the contract without receiving the money.

Winans v. Hassey, 48 Cal. 634.

Receipt for Margin.—A receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment, or the margin on the contract, is only *prima facie* evidence of the payment of the money, and may be explained by parol testimony.

Winans v. Hassey, 48 Cal. 635.

Broker—Identical Shares.—In transactions between principal and broker, the principal is not entitled to the identical shares of mining stock purchased on his order, but only the requisite number of shares; there is no special value in any particular share, unless issued in the name of a party, and charged to him upon the books of the company.

Boylan v. Huguet, 8 Nev. 345.

Stolen—Broker.—Where a broker received, in due course of trade, a transfer in blank of mining stock in a California company, which stock had in fact been stolen, and sold it: held, that he was liable to the true owner for its value and damages; and this, notwithstanding that he acted under the authority of one claiming to be the owner, and was ignorant of such person's want of title.

Bercich v. Marye, 9 Nev. 312.

Theft—Blank Power—Estoppel.—Where a share of mining stock with a blank power of attorney thereon indorsed, signed with the name of the original holder, was lost or stolen, and afterwards came to the hands of an innocent purchaser, in whose favor the company entered a transfer and issued a new certificate, but after notice of loss from the holder at time of loss: held, that after issuing a new certificate the company were

estopped from denying its validity at a subsequent time, and could not refuse to allow of its transfer as a valid certificate. (1857.)

Mandlebaum v. North Am. M. Co., 4 Mich. 465.

Stolen—Diligence to Notify.—The question whether a party who has lost stock by theft, as alleged, has used due diligence to prevent loss to third parties can not arise before defendant shows himself to be an innocent purchaser for value.

Sierra Nevada M. Co., v. Sears, 20 Nev. 347.

Lost Certificate.—If a corporation issues to an owner of shares of stock a certificate transferable on the books of the company by indorsement and surrender of the certificate, and he indorses the same and then loses it, and it comes into the hands of a *bona fide* purchaser for value, such purchaser acquires no right to the stock.

Sherwood v. Meadow Valley M. Co., 50 Cal. 412; B. & W. L. C. 594.

Passes by Delivery.—In this state mining stocks properly indorsed pass by delivery; and if the true owner places them in the hands of another on some secret trust between them without anything on the face of the certificate to show his ownership, he, and not an innocent purchaser or pledgee, must bear the loss.

Thompson v. Toland, 48 Cal. 99.

Nature—Not Negotiable.—Certificates of stock in a corporation are not negotiable securities in a commercial sense, but are mere evidences of the holder's title to a given share in the property and franchises of the corporation.

Sherwood v. Meadow Valley M. Co., 50 Cal. 412; B. & W. L. C. 594.

Negotiable Qualities.—Stock in a mining company incorporated under section 7, chapter 55, revised statutes of Michigan, is assignable by indorsement and delivery, and it seems the holder of stock so indorsed is entitled to the same rights which the law confers upon the holder of negotiable paper.

Mandlebaum v. North American M. Co., 4 Mich. 465.

Real Estate by Charter.—When the charter of a mining company has made its stock personal estate, but provided that its real estate should only be conveyed as other real estate, the legal title can pass only by deed.

Barksdale v. Finney, 14 Gratt. 338.

One Share Equivalent to Another.—When a bailee of mining stock is at all times able, ready, and willing to transfer to the

bailor the same number of shares of similar stock of the same company, and of the same value, the sale or conversion of the identical shares pledged only constitutes a technical breach of trust, and presents a case of *damnum absque injuria*.

Atkins v. Gamble, 42 Cal. 86; B. & W. L. C. 577.

Shares of stock in a corporation stand upon a different footing from other personal property, as regards the right to the recovery of the specified property, because they are mere evidences of interest in the business of the corporation, and if all the shares are of equal value, there can be no reason for preferring one share to another.

Atkins v. Gamble, 42 Cal. 86; B. & W. L. C. 577.

Identity.—Where certificates of stock of a corporation issued by P. were surrendered by H., to whom they had been assigned, and new certificates issued to H. in his own name: held, that this did not affect the identity of the stock.

Hawley v. Brumagim, 33 Cal. 394.

The Title to, in Corporation, before Issue—Personal Liability.—Until the division into shares of the capital stock, fixed and limited by the articles of association of a corporation organized under the general statute, chapter 61, the associated members of the corporation hold the whole capital stock in common; and by reason of such a holding, may be individually liable under the statutes of 1862, chapter 218, for the debts of a manufacturing corporation.

Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

Contract for—Form of Action.—Upon failure to deliver stock, *assumpsit* or covenant will lie, as the case may be, but not debt, unless the promise be to pay a certain sum of money in stock.

Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295.

Assignment of Void Contract.—The assignment of contract for the sale of mining stock which is void under the statute of frauds does not constitute a good consideration for a promise to pay.

Mayor v. Child, 47 Cal. 142.

Purchaser of Indorsed Certificates.—If the owner of mining stock allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the indorsement of the broker, with nothing on the face of the certificate to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, acquires a good title to the same,

even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal.

Thompson v. Toland, 48 Cal. 99.

§ 683. *Books, Impeachment of—Transfer on Books—California.*—Under the laws of California, the legal title to mining stock, except as between the parties, can only be transferred upon the books of the corporation.

Bercich v. Marye, 9 Nev. 312.

Under section 12 of the act of April 22, 1850, concerning corporations, no transfer of stock is good against third parties unless the transfer be made upon the books of the company.

Weston v. Bear River Company, 5 Cal. 186.

Legal Title Only by Transfer on Books.—The legal title to mining stock, except as between the parties, can only be acquired by transfer upon the books of the corporation.

State v. Pettineli, 10 Nev. 141.

"Transferable Only on Books of Company."—A sale and assignment of shares of the capital stock of a corporation, attended by a delivery of the certificate, vests in the vendee the title to the stock, notwithstanding a provision contained in the certificate that the stock was transferable only upon the books of the company.

De Comeau v. Guild Farm Oil Co., 3 Daly, 218.

Impeaching the Books—Refusal to Accept Shares.—If the entries in the stock and transfer book of a corporation are regarded as presumptive evidence that a person therein named a stockholder was such, the books are impeached and the presumption is overcome if the evidence given orally by witnesses shows that he never accepted, but refused to accept, any stock in the company.

Mudgett v. Horrell, 33 Cal. 25.

Transfer.—A transfer of stock which has not been entered on the books of the company as provided by the statute is nevertheless valid as against all the world, except a subsequent purchaser in good faith without notice.

Parrot v. Byers, 40 Cal. 614.

Transfer not Made on Books—Notice Equivalent—Attachment.—B., who was president and one of the directors of the Francetown Soapstone Company, on the twenty-fourth day of May, 1867, sold and transferred to the plaintiff a certificate for forty-five shares of the capital stock of said company, for which the plaintiff

iff paid him \$95 per share, the par value being \$100 per share. The certificate provided that the shares were "transferable in in person or by attorney only on the books of the company, on surrender of this certificate." B. continued to act as president and director up to January 27, 1868. On the twenty-eighth day of January, 1868, the shares, not having been transferred on the books of the company, were attached on a writ in favor of the company against B., as the property of B.: held, that the company was chargeable, under the circumstances, with notice of the sale and transfer of the shares by B. to the plaintiff; and that in the absence of fraud in fact on the part of the plaintiff he was entitled to hold the shares against the attachment.

Scripture v. Francetown S. Co., 50 N. H. 571.

Transfer—Title Need not be Traced.—A purchaser from one other than the original stockholder, who receives a certificate of stock with the usual assignment and power of attorney thereon, executed in blank by said stockholder, in an action against the corporation for refusal to transfer the stock on its books, is not bound to show affirmatively the title of his immediate transferrer. The presumption is that the stock was transferred and certificate delivered in the course of business, in the absence of evidence to the contrary.

Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

Refusal to Transfer—Attachment.—An attachment against stock, served on the company at the suit of a creditor of an assignor after the assignment, is of no validity, although the company has refused to make the transfer on its books. And such refusal makes the company liable to the vendee for the value of the stock.

De Comeau v. Guild Farm Oil Co., 3 Daly, 218.

Sale in Writing—Parol Evidence.—Oral testimony, offered with evident intention of varying and controlling the plain terms of a stock sale in writing, and not to establish an equity superior to the writing, is not admissible.

Menzies v. Kennedy, 9 Nev. 152.

Transfer of Capital Stock instead of Transfer of Mines—Fraud.—The Sussex Zinc Company agreed, under seal, to transfer to complainant all their stock, and all their property, real and personal. The legislature ratified the contract. The Sussex company then transferred all shares held by them, except thirty, out of the total forty-eight thousand shares. A year afterwards three of the directors of the Sussex company, who

held these thirty shares, applied to the legislature, and obtained the name of the Sussex company to be changed to that of Franklinite company, which was authorized to increase its capital stock, which stock, so increased, was divided by or among the holders of the thirty shares of the former company: held, 1. That by these proceedings the complainant became entitled in equity to all the property of the Sussex company; 2. That the Franklinite company, as to the property of the Sussex company, at the time of the transfer of stock, was a new corporation, and as such had no title, legal or equitable, to the property, which the Sussex company had agreed to transfer; 3. That the withholding of the thirty shares out of the forty-eight thousand shares of the Sussex company was fraud upon the rights of complainant, and a mere pretense for the organization of the company afterwards chartered upon those thirty shares as a basis, and that if such Franklinite company was not in fact a new corporation, the increased stock issued in its name should be held, either at law or in equity, as the property of complainant.

New Jersey Z. Co. v. Boston Franklinite Co., 15 N. J. Eq. 418, overruling same case in 13 Id. 322.

§ 684. *Specific Performance — Conversion — Demand.*—The general rule that a court of equity should not enforce a specific performance of an agreement for the transfer of stock applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law.

Treasurer v. Commercial C. M. Co., 23 Cal. 391.

Conversion.—Shares of mining stock may be the subject of conversion; and an allegation that defendant "took the shares" is a sufficient allegation that he converted the certificates, under the code.

Kuhn v. McAllister, 1 Utah, 273.

Conversion — Restoring Similar Shares.—The mere fact that the pledgee of mining stocks sells the particular certificate pledged does not render him liable as for a conversion of the pledge, provided the pledgee upon a redemption restores similar certificates, and has been at all times ready so to do.

Thompson v. Toland, 48 Cal. 100.

"Purchase" instead of "Issue."—Stockholders having directed the creation and sale of new stock, and the directors, instead

of so doing, acquired original stock and sold it, such sales will be valid, if subsequently ratified by the stockholders.

Crump v. U. S. M. Co., 7 Gratt. 362.

Exchange for Land—Paid-up Shares.—The holders of shares which, by agreement, are to be paid for in land, the agreement being accepted, and the land in the possession of the mining company, must be considered as the holders of paid-up shares.

In re Bosworthen v. Panzance M. Co., Jones' Case, L. R., 6 Ch., 48.

Paid up by Land at Fraudulent Valuation.—The acceptance of real estate as full payment upon stock, the actual value being much less, is void as to creditors of the corporation. The acceptance is lawful only to the extent of the actual value.

Tallmadge v. Fishkill Iron Co., 4 Barb. 387.

Stock not Paid up by Grant of Mining Lease.—An act authorizing lands as well as money to be considered as payment upon capital stock of a mining company does not authorize a leasehold interest to be treated as such payment.

Bashorr v. Dressel, 34 Md. 503.

Demand—Tender.—Where a contract is made for the delivery of certain shares of mining stock at a future day, it is not necessary for the purchaser to make an actual offer or tender of the money at the time and place in order to sustain an action for breach. If the demand be properly and sufficiently made, and the purchaser be prepared to pay at the time and place, this is sufficient.

Wheeler v. Garcia, 40 N. Y. 584.

Company not Responsible for Stockholder.—Where stock is purchased from a stockholder, no action will lie against the company for the recovery of money paid for such stock.

Kelsey v. Northern Light Oil Co., 45 N. Y. 505.

§ 685. *Shares Bought in by Company.*—An oil company having bought in shares of its own stock, afterwards divided them among the then stockholders *pro rata*; a stockholder, who between the time of such distribution had assigned a part of his stock, sued the company for a *pro rata* of the shares on the basis of the number held by him at the time of purchase: held, that his action is an affirmation of the purchase, and he can not allege that the company's funds were misapplied; and that as to him the distribution on the number of shares held by him at the time of distribution was equitable.

Coleman v. Columbia Oil Co., 51 Pa. St. 77.

Corporation Buying Stock.—An insolvent corporation can not purchase a portion of its capital stock. Such a transaction would be in conflict with the general statutes, chapter 135, section 3.

Currier v. Lebanon Slate Co., 56 N. H. 262.

A corporation whose capital stock, as fixed and limited, has not been fully paid in, can not relieve a delinquent stockholder from payment of assessment upon his stock by a purchase of the same, especially against the objection of another stockholder.

Currier v. Lebanon Slate Co., 56 N. H. 262.

Reputed Ownership—Printed Notice.—Where a shareholder, in a company where there is a printed notification on each share certificate that no transfer can be made without consent of the directors, agrees with the managing director that his shares shall be security, and the shareholder retains the shares, they are not in his reputed ownership.

Ex parte Harrison, 3 M. & Ayr. 506.

Law of Place of Delivery.—If a contract for the sale and consignment of certificates of stock of a corporation is entered into in another state, but the certificates are afterwards delivered in this state, the legality of the sale and assignment must be determined by the laws of this state.

Dow v. Gould & Curry S. M. Co., 31 Cal. 630.

Contract Warranting Value to a Day Certain.—A plain agreement to keep stock till a certain date, warranting that it shall be worth a certain sum by that date, can not be construed to compel the party to sell at a prior date at which the stock had reached a higher figure.

Hawley v. Brumagim, 33 Cal. 394.

§ 686. *Individual Liability.*—The statutory personal liability of stockholders in mining corporations does not affect the stock itself; and such liability does not, therefore, amount to a breach of warranty against incumbrances, upon a sale by a stockholder by whom such liability has been incurred.

Williams v. Hanna, 40 Ind. 535.

Individual Liability after Forfeiture.—A stockholder in a mining company, incorporated under the act of 1853, whose stock has been forfeited and sold for neglect to pay an assessment, as allowed by such act, for a sum less than the amount of the deficiency, is personally liable to the company in *assumpsit* for the deficiency.

Carson v. Arctic M. Co., 5 Mich. 288.

In case of *Carson v. Arctic M. Co.*, *supra*, declared the liability of an original stockholder; the same rule applies to a stockholder by purchase.

Merrimac M. Co. v. Bagley, 14 Mich. 505.

Individual Responsibility for Calls.—The transferee of shares of stock of an incorporated mining company, subject to the payment of future calls, is not personally liable for such unpaid installments in the act of incorporation.

Palmer v. Ridge M. Co., 34 Pa. St. 288, denied *Merrimac Co. v. Levy*, 54 Id. 227.

Pro Rata—Assessable and Non-assessable.—Upon final distribution of the proceeds of a mining corporation, the holders assessed shares have, in the absence of any provision for distribution, no right to have their assessments returned before *pro rata* distribution is made; but the holders of assessable and non-assessable stock must take equally.

North A. M. Co. v. Clarke, 40 Pa. St. 432.

When the officers of a mining corporation fraudulently over-issue certificates of stock, and it is satisfactorily proved that they did not represent genuine stock, the officers of the company issuing such false certificates are liable therefor to the assignee of the certificates, when they have been purchased and held in good faith.

Bruff v. Mali, 36 N. Y. 200.

Issue to Defaulting Contractor.—The issue of the stock of a mining company to a firm which had subscribed to stock of a railroad company, and had entered into a contract with the railroad company to build a part of its road, at the request of the mining company, the issue being approved by both directors and stockholders, is valid although the contract to build the road was never carried out, and although the company may be in equity entitled to a return of its stock.

Savage v. Ball, 17 N. J. Eq. 143.

Implied Contract to Pay Assessments.—The obligation of a stockholder to pay assessments on his stock is an implied contract, upon which an affidavit of defense can not be required under rule of court calling for such affidavit upon contracts for the direct payment of money.

Woodwell v. Bluff M. Co., 25 Pa. St. 365.

Calls Paid by Payments to Creditors.—Payments to *bona fide* creditors of a corporation by stockholders, credited to such stockholders on the books of the company, are good payments

upon their stock, and constitute such stock paid up to the extent of such payments to creditors, and no resolution of the board of directors can afterwards invalidate such payments.

Carr v. Le Fevre, 27 Pa. St. 413.

Dividends.—The plaintiff, in order to recover from a corporation the dividends on its stock, must be the owner of the stock at the time the dividends accrued. Mere possession of the stock or a special property therein is not sufficient.

Dow v. Gould & Curry S. M. Co., 31 Cal. 630.

Dividends on Sale—Time—Construction.—Plaintiff assigned to defendant, September 22d, two shares of stock in a mining company, stating in the assignment: "I authorize the transfer to him (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second, but the trustees did not, in fact, declare dividends until between noon and one o'clock on Tuesday: held, that the dividends belonged to plaintiff, and that parol evidence was admissible to explain the transaction and point its meaning.

Brewster v. Lathrop, 15 Cal. 21.

• § 687. *Forfeiture of Shares—Notice—Presumption.*—The articles of association of a joint-stock company provided that if a shareholder should fail in paying any call, the company might give him notice that in default of payment within a specified time his shares would be forfeited; that if the requisition of any such notice were not complied with, the shares might be forfeited by a resolution of the directors to that effect; that when any share has been so forfeited, notice of such forfeiture should be given to such shareholder, and an entry should be forthwith made in the register of shareholders stating the date of such forfeiture, and that any share so forfeited should become the property of the company. K., a shareholder in the company, made default in payment of his calls, and notice was sent to him in due form, that unless he paid the calls by the second of September, they would be forfeited. The time having elapsed without payment, the secretary made entries in the books on the third of September, and the shares were forfeited and had been transferred to the company. But there was no entry in the minutes of any resolution having passed by the directors, nor any evidence of any notice of the forfeiture having been sent to K.: held, that there was a valid forfeiture of the shares, and that K. could not be placed on the list of contributaries as a

member of the company. As the entry of forfeiture on the books could not have been properly made without a resolution of the directors, the court was bound to assume that such a resolution had been passed. 2. That the forfeiture was complete on the third of September, without sending a notice of it to the shareholders, the provision in the articles as to sending the notice being mandatory only, and not of the essence of the forfeiture.

In re North Hallenbeagle M. Co.; Knight's Case, L. R., 2 Ch. App., 321.

Shares Forfeited between Sale and Suit.—Where, after a fraudulent sale of mining shares, and after demand to rescind and suit brought to set aside the sale, the shares become forfeited, both vendor and vendee, plaintiff and defendant, having full notice of the calls, the loss will fall upon the party against whom the decree ultimately goes. There is no engagement on the part of the plaintiff to maintain such property during a suit to set aside a fraudulent sale thereof.

Maturin v. Treddenick, 10 L. T., N. S., 331; see S. C., 9 Id. 82.

Rescission after Sale of Stock—Fraud.—A plaintiff seeking to set aside as fraudulent a sale of mining shares made to him by the defendant can not have a rescission after he has sold such shares; but the sale of certain shares does not deprive him of the right of rescission as to others not sold, where the property is all of one sort. (In this case shares in different companies.)

Maturin v. Treddenick, 10 L. T., N. S., 331; see S. C., 9 Id. 82.

Seizure by Sheriff on the Person.—Where a defendant in an attachment suit was examined under section 131 of the practice act, and on its appearing that his only property subject to attachment consisted of mining stock which he had upon his person, the district judge ordered it to be delivered to the sheriff, to be held subject to the result of the suit: held, that such order was not in excess of the jurisdiction of the district judge.

Bivins v. Harris, 8 Nev. 153.

Lis Pendens.—The pendency of an action in another state to determine the title to corporate stock is not constructive notice to a purchaser in this state of a defect in the title of his assignor, and does not affect the title acquired by him.

Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

Equitable Power to Compel Issue—Practice.—Where the board of directors of a corporation, in issuing new stock to the stockholders generally, refuse to issue to a particular stockholder his

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due proportion of such new stock, he may compel its issue to him by suit in equity against the corporation, there being sufficient of such stock undisposed of, notwithstanding his remedy at law for damages.

Dousman v. Wisconsin M. & S. Co., 40 Wis. 418.

But in such case the interest of each shareholder in like condition is several, and they can not bring an action in the name of one on behalf of himself and others.

Dousman v. Wisconsin M. & S. Co., 40 Wis. 418.

CHAPTER XXXVIII.

MINING CLAIMS BEFORE COURTS.

INJUNCTIONS IN MINING CASES.

- § 688. Against Officers of Land Department.
- § 689. Jurisdiction of Courts—State and Federal.
- § 690. Irreparable Damage.
- § 691. Trespass.
- § 692. Collieries.
- § 693. Quarries.
- § 694. Protecting Lateral Supports.
- § 695. Water Rights.
- § 696. Stockholders against Trustees.
- § 697. Smelting-works—Nuisance.
- § 698. *Cestui Que Trust*.
- § 699. Patent to Quarter-section Containing Lode.
- § 700. Mineral Springs.
- § 701. Equity Jurisdiction.
- § 702. Temporary Injunction.
- § 703. Interlocutory.
- § 704. Mandatory.
- § 705. When should not Issue.
- § 706. Answer.
- § 707. Insolvency.
- § 708. Practice.
- § 709. On Appeal.

§ 688. *Against Officers of Land Department.*—An injunction will not lie against an officer of the land department, to control him in his official duty which requires the exercise of his judgment and discretion.

Marquez v. Frisbie, 101 U. S. 473.

Where the legal title is vested, the equities subject to which the patentee holds it may then be judicially enforced, and where that department has upon the uncontradicted facts committed an error of law by which the land has been awarded to a party to the prejudice of a right of another, the latter is entitled to relief.

Where, however, there was a mixed question of law and fact, and the court can not separate it so as to ascertain what the mistake of law is, the decision of the department affirming the right of one of the contesting parties to enter a tract of public land is conclusive.

Marquez v. Frisbie, 101 U. S. 473.

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A temporary injunction is dissolved by a final judgment, and the fact that plaintiff has appealed does not modify its legal effect in this particular.

Gardner v. Gardner, 87 N. Y. 14.

§ 689. *Jurisdiction of Courts—State and Federal.*—A state court has the power and jurisdiction to issue an injunction in favor of one foreign corporation against another foreign corporation, both having been organized under the laws of Great Britain. •

Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N. Y. 153.

No injunction will be granted by a United States court to interfere with the possession, control, or disposition of property which is in the hands of a receiver appointed by a state court.

Hutchinson v. Green, 2 McGarry, 471.

The plaintiff in an action brought in a state court may, under certain circumstances, be enjoined by a circuit court of the United States from further prosecuting the cause in the state court.

Dietzsch v. Hendecoper, 103 U. S. 494.

But where an injunction is granted to a party without requiring him to give bond or other undertaking, the circuit court has no power to award damages to the injured party, except by such a decree in the matter of costs as may be deemed equitable.

Russell v. Farley, 105 U. S. 433.

Mining Cases Distinguished from Common Cases for the Writ. Injunctions to prevent persons from working a gold mine, to which the plaintiff claims title, are not put upon the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated.

McBrayer v. Hardin, 7 Ired. Eq. 1.

In cases of the former class, where it appears that if the defendants' allegations be true, the injunction can do them no harm, but if the plaintiff's allegations be true, he may sustain an irreparable injury, the injunction should be continued to the hearing, that the facts may be investigated.

McBrayer v. Hardin, 7 Ired. Eq. 1.

Jurisdiction to Protect Mines.—The general rule is that a court of equity takes no jurisdiction in cases mere trespass, not even by granting a temporary injunction. There is an established exception, however, in the cases of mines, timber, and the like, in which cases injunctions will be granted to restrain the continued commission of acts by which the substance of the estate is

destroyed or carried off. But when the plaintiff seeking an injunction in such cases claims to be the legal owner of the property, he must show that he has established his legal title by the judgment of a court of law, or that he is prosecuting his suit at law, and that the injury which he will sustain by the acts of the defendant before he can obtain judgment will be irreparable; and in the latter case, the court in continuing the injunction must make such order as will insure the speedy determination of the suit at law.

Irwin v. Davidson, 3 Ired. Eq. 311.

Jurisdiction—Waste and Trespass.—The jurisdiction of chancery to restrain by injunction and to compel an account, in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass.

Thomas v. Oakley, 18 Ves. jun. 184.

Jurisdiction—Adverse Title.—The jurisdiction of a court of equity to restrain the destruction of the estate by mining, where a defendant is in adverse possession under claim of title, considered.

Haight v. Jaggard, 33 Eng. Ch. 231; S. C., 16 Me. & W. 524.

Jurisdiction—Title—Trespass.—The jurisdiction of a court of equity to restrain trespass in the case of the working of mines is lawfully established, whether the title be brought in issue or not; but where the title is denied, the court will look more closely into the character of the trespass.

Moore v. Ferrell, 1 Ga. 7.

An injunction will be granted to restrain a trespass in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief; but in ordinary trespasses, or where the remedy at law is adequate, equity refuses to interfere.

Bracken v. Preston, 1 Pinn. 584.

Trespass in digging or mining on the land of another is within the cognizance of a court of equity when committed by a mere wrong-doer, or where a party exceeds a limited authority.

Bracken v. Preston, 1 Pinn. 584.

Reasons Supporting Writ against Continuous Lode Mining.—A writ of injunction *pendente lite* will lie to restrain trespass in removing auriferous quartz from a mine where the injury threatens to be continuous and irreparable.

Merced M. Co. v. Fremont, 7 Cal. 317.

It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law.

Merced M. Co. v. Fremont, 7 Cal. 317.

The impossibility of an accurate estimate of the damage done, in case of extraction of valuable ores, is to be considered as a reason for the issuance of the preventive remedy by injunction.

Merced M. Co. v. Fremont, 7 Cal. 317.

Injunctions in Reference to Mines.—The reasons for giving to courts of equity jurisdiction to restrain trespass apply nowhere with such great force as where mines of the precious metals abound. The impossibility of proving at law the amount of gold taken, stated.

Moore v. Ferrell, 1 Ga. 7.

Gold Mine.—The working of a gold mine is the taking away the substance of the estate.

United States v. Parrott, 1 McAll. 271.

Gold-mining as a Trespass.—The removal of gold from a mine is emphatically a destruction of the entire substance of the estate, and comes within that class of trespasses in which injunctions are now universally granted.

Merced M. Co. v. Fremont, 7 Cal. 317.

Emma Mine Case.—Bill for injunction. Complainant averred the discovery, and the location of discovery claim, and the location of claim No. 1 on the St. Louis lode by one Brain in 1865, and of No. 2 by one Nichols, compliance with the mining laws, working, etc., viz., that complainant in 1868 was working claim No. 1, expended large sums, and disclosed a rich vein; that during that time he let a contract to Woodman on the lode (in what capacity does not appear in the report), and that Woodman, though knowing the claim to belong to Brain, pretended to make a discovery and location of his own on the lode. The bill further averred that complainant was the owner of title of Brain and Nichols, but not stating how or when he became such owner. Defendant's answer showed the decease of Brain, and a probate court sale of Brain's interest (without notice to the heirs), and the purchase of the same by the plaintiff upon a speculating contract for \$1,000, and a twelfth interest in case of successful suit, etc., from the assignee at the probate sale; averred that the contract made between plaintiff and Woodman related to other property, long since abandoned, and denied the identity of the property sued for; and alleged that defendant had discovered and located the Emma lode in 1868; that plaintiff made

no claim for the premises until 1870, when defendants had developed their great value: held, no case for injunction, because:

1. The bill did not make a sufficiently specific case, not showing how title acquired; 2. All the equities of the bill were denied, and the facts not only denied, but evidently in great doubt; 3. The complainant was guilty of laches; 4. Taking the bill and answer together, it showed no case addressed to the discretion of the court, nor admitting of equitable interference.

Lyon v. Woodman, 3 Leg. Gaz. 81.

§ 690. *Irreparable Damage—Title*.—Injunction may issue to stay irreparable mischief or waste, in case of disputed title.

United States v. Parrott, 1 McAll. 271.

Irreparable Damage by Working Colliery.—Waste to restrain trespass in mining upon the land of a stranger will be granted to prevent the irreparable damage which would be the consequence, and because mining is a species of trade.

Flamang's Case, cited in 6 Ves. jun. 147; 7 Id. 308; 8 Id. 89.

This case is commonly cited as the first case in which injunction to restrain trespass, as distinguished from waste, was granted.

See *Livingston v. Livingston*, 6 Johns. Ch. 499.

Trespass—Irreparable Injury—Damages.—An injunction will not be granted in aid of an action of trespass (cutting a ditch) unless it appears that the injury will be irreparable, and can not be compensated in damages.

Waldron v. Marsh, 5 Cal. 119.

It is not sufficient that the affidavits should allege that the injury will be irreparable; it must be shown to the court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right.

Waldron v. Marsh, 5 Cal. 119.

Irreparable Mischief.—An injunction ought not to be granted except for the prevention of great and irreparable mischief.

Lyon v. Woodman, 3 Leg. Gaz. 81.

Continuing Trespass—Irreparable Mischief must be Alleged. Upon the allegations of tenants in fee that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same, that they have instituted actions for the

said trespasses, which are now depending, an injunction will not be granted to restrain further acts of trespass or waste.

Hamilton v. Ely, 4 Gill, 34.

In such a case, to authorize an injunction, the allegation that the trespass was to the destruction of the inheritance, or the mischief irreparable, is essential, and the facts must be stated to show that the apprehension of further acts of trespass was well founded, to satisfy the conscience of the court.

Hamilton v. Ely, 4 Gill, 34.

Preservation of Property.—When the title to a mining claim is in controversy, an injunction may be granted to preserve the property pending the litigation.

Hess v. Winder, 34 Cal. 270.

Saving the Estate Pending Contest.—Parties claiming ownership, and having for several years been in possession (by their tenants), of coal mines and lands in Schuylkill county, applied to the supreme court in Philadelphia for an injunction to restrain acts of waste and trespass threatened by parties asserting right as lessees of other parties claiming title adversely to the plaintiffs: held, that injunction was the proper remedy, although the defendants were out of possession; and that where the subject of dispute may be destroyed, the court will interfere to prevent such destruction until the title be ascertained.

Munson v. Tryon, 6 Phila. 395.

Irreparable Injury—Suit at Law.—Mines, quarries, and timber are protected by injunction upon the ground that injuries to and depredations upon them are or may cause irreparable injuries, and with a view to prevent multiplicity of suits; nor is it necessary that plaintiff's right should first be established in an action at law, the evidence in the case for the injunction showing a clear title in the plaintiff and only a sham title set up by the trespassing defendant.

West Point Iron Co. v. Reymert, 45 N. Y. 703.

Trespass not Irreparable—Canal Commissioners—Taking Stone. An injunction is not granted to restrain a trespass where the injury is not irreparable in damages but is susceptible of perfect pecuniary satisfaction by remedies at law.

Jerome v. Ross, 7 Johns. Ch. 315.

Where by statute the canal commissioners were authorized to enter upon any lands and take such stone, etc., as might be needed in the construction of the canals of the state, but without any specific provision for compensation, and parties who had

contracted to furnish stone for a certain dam and lock on the canal were breaking stone from a ledge on complainant's land, for which trespass he had already recovered two judgments before a justice of the peace, but without thereby inducing the defendants to desist, the court refused an injunction.

Jerome v. Ross, 7 Johns. Ch. 315.

Removal of Ore.—The removal of ore already extracted may be enjoined as well as the further extraction of it.

United States v. Parrott, 1 McAll. 271.

Digging Lead Ore on Public Domain.—Digging lead ore from the lead mines upon the public lands is such waste as entitles the United States to an injunction.

United States v. Gear, 3 How. 132.

§ 691. *Trespass—Clear Title.*—Injunction against a trespasser to prevent his taking ore ought to issue in favor of a party in possession under a clear title without requiring him to bring any action at law.

Anderson v. Harvey, 10 Gratt. 386; see section 19, *supra*.

Destructive Trespass—Iron Ore.—The taking of iron ore from land of little or no value except for such iron ore is a trespass which goes to the destruction of the estate.

Anderson v. Harvey, 10 Gratt. 386.

Naked Trespass—No Injunction before Injury Complete.—The court will not interfere by injunction to restrain the commission of naked trespasses where there is no waste committed.

Nevada Co. v. Kidd, 37 Cal. 283.

It will not restrain the diversion of water by injunction until the party claiming is in condition to use it. While the dam and canal of the party claiming the water are in process of construction, but are not yet in condition to appropriate the water, the use of the water by other parties is no injury, and affords no ground for relief, legal or equitable.

Nevada Co. v. Kidd, 37 Cal. 283.

Both Trespassers.—To justify an injunction, not only must defendant be in the wrong, but the plaintiff must be in the right. It should not be granted where both are trespassers on the rights of a third party.

Lyon v. Woodman, 3 Leg. Gaz. 81.

Against Trespass—Insolvency.—It has long been settled that where a mere trespasser digs into and works a mine to the in-

jury of the owner, an injunction will be granted, and more particularly is this true when the trespasser is insolvent.

Lockwood v. Lundsford, 56 Mo. 68.

Disregard of Distinction between Waste and Trespass.—There has been for years an increasing disposition on the part of courts of equity to disregard the distinction between waste and trespass amounting to waste, and to restrain the latter as well as the former by injunction.

Munson v. Tryon, 6 Phila. 395.

Waste—Subtenant—Plaintiff Indemnified.—The court will not interfere to restrain the waste of a subtenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord.

Keogh v. Collins, Hayes & J. 805.

Threats of Future Working.—When defendants had entered upon ground to which they had no title as parcel of lands to which they had title and had searched for minerals, and in their answer asserted claim to the premises but disavowed an intention of present working: held, that they threatened a wrong under this state of facts, so as to give the court jurisdiction to restrain by injunction.

Hext v. Gill, Law R., 7 Ch. App., 699; S. C., 3 Moak, 574.

§ 692. *Colliery.*—One who begins to get coal in his own ground and works into his neighbor's coal will be restrained by injunction.

Mitchell v. Dors, 6 Ves. jun. 147.

Colliery—Reluctance to Stay Work.—“The court grants injunction to stay working of a colliery with great reluctance, from the great inconvenience it occasions; and never will do it but where there is a breach of an express covenant or an uncontroverted mischief.”

Anon., 1754, 1 Amb. 209 (Per Lord Hardwicke).

Mine in Operation.—There is a distinction between enjoining a mine in operation and restraining the opening of a new one.

Grey v. Northumberland, 13 Ves. jun. 236; S. C., 17 Id. 281.

To Prevent Instroke.—For case of injunction granted to prevent parties who had contracted to sink a deep shaft on coal lands, for the benefit of such coal lands, from using it to operate lands owned by other persons, see Leavers v. Cleary, 75 Ill. 349.

To Restrain Working—Discretion.—The exercise of the power of a court to restrain, by injunction, the working of a mine rests

in the discretion of the court, and from the nature of things, the extent to which the jurisdiction may be exercised can not be defined.

Lyon v. Woodman, 3 Leg. Gaz. 81 (Emma Mine Case).

An injunction to restrain the working of a mine may be granted or refused in the exercise of a sound discretion, governed by the nature of the case; it can not be demanded as a matter of right, nor can the jurisdiction to grant it be limited by any adjudged case or defined line.

Lyon v. Woodman, 3 Leg. Gaz. 81 (Emma Mine Case).

Discretion.—The operations of large mining companies should not be arrested by injunction without notice, except in very plain cases, or where there is a pressing necessity for immediate action. There is a discretion which the court must exercise in every case.

Capner v. Flemington M. Co., 2 Green Ch. 467.

Damage and Drainage to be Considered.—The possibility of destruction of a coal mine in event of injunction is to be considered, and the expense of drainage while idle.

Clavering v. Clavering, 2 P. Wms. 388; S. C., Mosely, 219; Sel. Ch. Cas. 79.

Abandonment—Angle in Vein—License.—Defendants by a change in the course of the vein of lead ore, upon which they were working as licensees or claiming to be licensees, came upon ground covered by an older license, under which no work had been done for several years. The defendants having struck rich mineral, the holders of the old license sought an injunction: held, that the old license had not been abandoned, and that defendants were rightly enjoined.

Anderson v. Simpson, 21 Iowa, 399; see opinion of Dillon, J., dissenting, page 405.

Benefit to Defendant—No Injury to Plaintiff.—Defendants, who without right cut an air-course through plaintiffs' coal for the benefit of their own mines, may be restrained from using it, although its further use entails no further damage upon the plaintiffs.

Powell v. Aikin, 4 Kay & J. 343.

And access may be allowed to defendants' mine to allow plaintiff to block it up.

Powell v. Aikin, 4 Kay & J. 343.

Technical Right—Oppressive Action.—Defendant to bill for injunction and for account, being tenant of a copy-hold farm,

had dug out the loose stone within about eighteen inches of the surface and sold it. He answered, avowing custom of all persons occupying the lands to do the same, and that the taking of the same was for the benefit of the land. The stone had no especial value as stone. The surface soil was replaced. The court awarded an injunction and payment of the amount received for the stone, the defendant declining to resist a suit to test his right at law, and for this reason only holding that it was not a case where equitable relief should have been sought.

Cuddon v. Morley, 7 Hare, 202.

Delay—Expenditures.—Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines and expend large sums of money upon their mining operations, the court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

Parrott v. Palmer, 3 Myl. & K. 632.

Acquiescence—Practice—Notice.—Acquiescence for some time in the wrong complained of is sufficient to defeat an *ex parte* injunction; but after notice it must amount to a waiver of the terms of contract to prevent the injunction.

Mexborough v. Bower, 7 Beav. 127.

Against Disturbance by Estopped Owner.—A party by whose encouragement expenditures (coal breaker) have been made, to such an extent as to be incapable of reimbursement except by enjoyment, will be enjoined from disturbing the possession; he is estopped because he would wrong the party by withdrawing his consent.

Big Mountain Co.'s Appeal, 54 Pa. St. 361.

When the complainant has such a right, and the defendant is thus estopped, the defendant may be enjoined from prosecuting an ejectment for the premises; and the fact that complainant would have a defense to the ejectment is no bar to relief in equity, because ejectment would not affirmatively assert the complainant's right short of three verdicts.

Big Mountain Co.'s Appeal, 54 Pa. St. 361.

Laches.—If the plaintiffs permit the defendants to remain in possession of a mining claim several months without interference, working it as their own, and expending large sums of money in developing it, a court of equity will require a very

clear and strong showing to induce it to grant or sustain a preliminary injunction to stop the work.

Real del Monte C. G. & S. M. Co. v. Pond G. & S. M. Co., 23 Cal. 82.

Speculative Purchase from Outside Claimant.—The inadequacy of price paid by a plaintiff seeking an injunction, and the fact of his purchasing while the mine was in the adverse possession of other parties, considered as reasons for refusing injunctive relief addressed to the discretion of the court, and injunction refused accordingly.

Lyon v. Woodman, 3 Leg. Gaz. 81 (Emma Mine Case).

Weakness of Plaintiff's Equity—Collusion with Tenants.—Injunction granted to prevent the threatened opening and working of coal mines, based, among other things: 1. Upon the smallness of the consideration paid by the defendants for the title asserted by them; 2. The fact of their deed expressly excluding warranty of title; and, 3. Alleged tampering with tenants of coal operators in possession.

Munson v. Tryon, 6 Phila. 395.

Wrong Already Committed.—Where, upon trial on bill for injunction to restrain the issue of county bonds to a coal and railroad company, it appeared that the bonds had been in fact issued before the preliminary writ had been served: held, that no relief could be had by the writ of injunction.

Menard v. Hood, 68 Ill. 122.

Injury Already Complete.—Where a mining claim had been worked before suit in such a way by washing the earth from under the plaintiff's ditch, that according to the testimony it must result in the ruin of the ditch from the work already done: held, that further work on a valuable claim ought not to be enjoined, the result necessarily being injury to the defendant without benefit to the plaintiff.

Clark v. Willett, 35 Cal. 534.

Injury Remediable at Law—Insolvency.—Where the bill charges a mere trespass where the injury is not irreparable and destructive to the complainant's estate, but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law, and no charge of insolvency in the defendants, an injunction ought not to be granted.

Hamilton v. Ely, 4 Gill, 34.

Insolvency.—When the title to the property is in dispute, the question whether the defendants are solvent and able to respond

in damages forms an important element in passing upon an application for an injunction pending the litigation.

Real del Monte C. G. & S. M. Co. v. Pond G. & S. M. Co., 23 Cal. 82.

Damages Ascertainable.—The fact that the value of ore taken by trespass could be readily estimated, does not deprive a court of equity of its right to interfere by injunction.

Anderson v. Harvey, 10 Gratt. 386.

Disputed Title.—An injunction to stay the working of a mine may be granted notwithstanding a question of title is involved. But the fact of title being involved will add to the caution of the court in granting it. It is not necessary for a plaintiff to establish his title by a suit at law, where it is not doubtful and not in dispute. But if disputed and in doubt, a court of equity will not settle it for him. He must show a *prima facie* case, free from reasonable doubt, and a case free from the imputation of laches.

Lyon v. Woodman, 3 Leg. Gaz. 81 (Emma Mine Case).

Obscure Grant—Oil—Expenditures.—Where the wording of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless it is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of the deed be true, can ultimately get the benefit of it all, and where the defendant had not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable. So held, upon a bill to prevent the owner of an upper tract on Oil creek, Pennsylvania, from sinking an oil-well, filed by a party who owned a tract of land immediately below, and who before the method of boring for oil had been discovered, and when it was skimmed in small quantities off the stream, had procured from the owner of the upper tract an inartificially drawn grant or license of the oil, or the right to get it, and which might be construed as going only to such oil as might be found on the surface.

French v. Brewer, 3 Wall. jun. 346.

To Protect Minerals in Solution.—Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool through which ran a stream from the mountains, depositing in its passage mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part

thereof, any soil, oxide of iron, ocher, shine, deposit, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off, any soil, oxide of iron, ocher, shine, deposit, or mineral substances already deposited or thereafter to be deposited upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law.

Thomas v. Jones, 1 You. & Coll. 510.

§ 693. *Quarries*.—If chancery will restrain by injunction trespass committed in mining ore or coal, it will give the same relief against quarrying stone. No distinction on the question of comparative value can be made.

Thomas v. Oakley, 18 Ves. jun. 184.

To Protect Lessee—Writ Expires with Term.—A party claiming the right to work lead mines as a lessee may be protected against a trespasser by injunction, but the decree should not be made perpetual after the expiration of the lease, although the lease contain a general covenant for renewal.

Boyle v. Laird, 2 Wis. 316.

If the interest of a complainant has expired after suit brought against a party who was in fact a trespasser, the bill should be dismissed without costs.

Boyle v. Laird, 2 Wis. 316.

Lease.—In a dispute as to their rights between parties working under different leases on the same coal veins, no injunction can be granted in advance of the settlement of their rights at law, except to prevent irreparable mischief or injury.

Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183.

A preliminary injunction is a restrictive or prohibitory process to compel the party to maintain his *status* merely until the matters in dispute shall be determined; only granted (in addition to cases of the invasion of unquestioned rights) for the prevention of irreparable mischief, which can not be repaired under any standard of compensation.

Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183.

Where the defendants had run a gangway in such a direction as to cut off plaintiffs from coal which they otherwise might have taken, it is a past transaction, and not to be redressed by preventive process.

Mammoth Vein Coal Co.'s Appeal, 54 P. St. 183.

It was in proof that defendants knew of the direction and extent of plaintiff's work, which they allowed to be continued without objection. Even if this fact were only doubtful, it would be sufficient to defeat an injunction, for they should have been on their guard to prevent the expenditure of money on what they meant should not be realized upon by the parties expending it.

Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183.

After Lease Expired.—Where the complainant, lessee of a lead mine, had procured a temporary injunction to restrain the defendants from working his premises, but his lease had expired before the hearing, it was held error to decree upon the hearing a perpetual injunction without the addition of the new parties in interest as complainants.

Laird v. Boyle, 2 Wis. 433.

Against Tenant in Default.—Mining can not be waste under a lease given for the express purpose of mining, and if the tenant continues to mine without payment of royalty, the lessor can not have the writ of estrepement; his remedy must be in some other form. Payment of rent is not a condition upon which the tenant's right to mine depends; the lease reserving no right of re-entry or forfeiture in any such sense as to make the mining illegal if he fail to pay rent.

Heil v. Strong, 44 Pa. St. 264.

Against Tenant Quarrying Stone.—The lands of A., on which there was an open quarry of limestone, were demised for the term of three lives, renewable forever, reserving to the lessor all royalties. Upon the facts lessee was enjoined from raising the limestone for sale.

Purcell v. Nash, 2 Jones, 116; S. C., 1 Id. 626.

Life Tenant Exhausting Mine.—Though a court might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, yet not such mining as is subject to no other objection than its liability to exhaust the mine.

Irwin v. Corode, 24 Pa. St. 162.

Even in a case of possible wrong to the remainderman, estrepement is not the remedy.

Irwin v. Corode, 24 Pa. St. 162.

License.—A licensee can not enjoin a subsequent lessee of the same minerals, the license not being exclusive, and defendant not interfering with the actual possession of the licensee.

Carr v. Benson, L. R., 3 Ch. App., 524.

Customs—Easement.—If by the local customs the owner of one mining claim has a right to construct a tunnel through an adjoining claim in order to enable him to work his own claim, a court of equity may enjoin any interference with that right.

Bliss v. Kingdom, 46 Cal. 651.

Abuse of Privilege.—Injunction issued to restrain the unlimited taking of stone by a defendant who had a restricted right to take stone for certain uses in connection with certain lands.

Thomas v. Oakley, 18 Ves. jun. 184.

Against Railroad.—A railroad company organized for the benefit of coal mines, and not within any of the statutes authorizing the condemnation of lands for railroads connecting with coal mines, should be enjoined from constructing its road across private property.

Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257.

Acquiescence in Location of Railroad—Lessee Mining under Road-bed.—A railroad was constructed over certain lands without legal proceedings to condemn it, but without objections from the owners. Afterwards proceedings to assess damages were commenced but compromised. After the road was built, but before the release, coal veins undercropping the road-bed were let by the owner of the land: held, that the title of the railroad company was by the original occupation without objection; that the release was only a discharge of the damages to the owners, and that the lessee of the coal took his lease subject to the right of way, and the coal company were enjoined from mining under the road.

Lawrence's Appeal, 78 Pa. St. 365.

Working under Road-bed.—For instance of injunction to restrain working of mine under a railroad, see Caledonian R. Co. v. Belhaven, 3 Macq. 56.

§ 694. *Protecting Lateral Support—Buildings.*—A court of equity has power to restrain a land owner from excavating or removing soil from his land adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of his lateral support, to fall or subside.

Farrand v. Marshall, 21 Barb. 409; S. C., 19 Id. 380.

The doctrine of granting relief under such circumstances is confined to those cases in which the plaintiff has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. If he has himself erected buildings upon the margin

of his own land, he is regarded as himself at fault, and therefore not entitled to recover.

Farrand v. Marshall, 21 Barb. 409; S. C., 19 Id. 380.

Buildings—Encroachment of Sea—Action to Support Injunction.

An application for injunction to restrain the taking of stone from the sea-shore between tides, where the damage seemed to be not so much the value of the stone, but the fact that the sea would encroach on the land from which the stone was removed, and endanger the house of the plaintiffs, although both sides claimed title and it was purely a question of law between them, the court, upon consideration of the greater inconvenience suffered by the plaintiff, gave the injunction with *leave* to bring his action, but refused to say that he must do so.

Clowes v. Beck, 13 Beav. 347; 20 L. J. Ch. 505.

Lateral Support—Additional Weight of Buildings.—Where houses of the plaintiffs were injured by mining operations of the defendant, in adjoining land which would have caused the soil to subside without the additional weight of the house, decree made for perpetual injunction and for compensation.

Hunt v. Peake, John. 705.

§ 695. *Water Rights.*—Upon the bill of the prior appropriator of water for mining purposes against parties interfering with his prior appropriation, the granting of injunctive relief will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether defendants are able to respond in damages, and other considerations which ordinarily govern courts of equity in the exercise of preventive process.

Atchison v. Peterson, 20 Wall. 507; B. & W. L. C. 730, affirming S. C., 1 Mont. 561.

Protecting Water Right—Worked-out Claims—Benefits and Hardships not Considered.—The owner of water claiming it of right (as found by the referee) is entitled to enjoin parties who have no title to it from using it, although his own mines are nearly worked out, and although to enjoin its use would work more hardship to the defendant than benefit to the plaintiff. Such considerations are of no weight against an express finding of the right in the case.

Fabian v. Collins, 2 Mont. 510.

Water Ditch—Slight Damage.—When complainants were prior appropriators of the waters of a gulch, to a certain number of

inches for mining purposes, by a ditch leading from it at a certain point, above which point defendants mined and muddied the water flowing into complainants' ditch, and rendered the flow of sand into the ditch somewhat greater, but causing no great amount of additional labor or expense to keep it clear: held, that an injunction was properly refused.

Atchison v. Peterson, 20 Wall. 507; B. & W. L. C. 730, affirming S. C., 1 Mont. 561.

In such case the injury to the complainant is inappreciable compared to the damage which would result to the defendants from the indefinite suspension of work upon their mining claims.

Atchison v. Peterson, 20 Wall. 507; B. & W. L. C. 730, affirming S. C., 1 Mont. 561.

Dam to Stop Tailings.—It is not "an abuse of discretion" for a court to refuse to enjoin parties from building a dam upon their mining ground to prevent tailings from injuring their property.

Nelson v. O'Neal, 1 Mont. 284.

Diversion of Water by Threatened Subsidence.—By mining operations the defendant had sunk not only the level of a stream supplying the plaintiff's mill, but also that of the adjoining land. The plaintiff filed a bill for an injunction; but it did not appear that there had been as yet any diminution of water to the mill: held, that the bill ought not to be dismissed; and on the defendants' undertaking not to work the minerals so as to obstruct, etc., the water and the supply thereof along the watercourse, it was retained, with liberty to apply. The court, however, intimated that in default of the undertaking being given, an injunction would be granted.

Elwell v. Crowther, 31 Beav. 163.

Continuing Diversion.—No equitable remedy can be had for a mere *past* diversion of a watercourse; but when the injury is continuing, relief may appropriately be sought in equity.

Tuolumne W. Co. v. Chapman, 8 Cal. 392.

Diversion must be Continued—Complaint.—Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction.

Coker v. Simpson, 7 Cal. 340.

The writ of injunction, though remedial, must be based on some equitable circumstances.

Coker v. Simpson, 7 Cal. 340.

Flooding Mine from a River—Dip.—A bill averred that a mine which the defendant threatened to work could not be worked without letting in a river and flooding defendant's mine, and through that the plaintiff's mine, which lay on the dip of the coal seam below the defendant's mine, and prayed an injunction. Demurrer to the bill overruled, the case being distinguished from the ordinary instance of the lower mine on the dip, having no protection from the water produced in mines from the working in ordinary cases.

Crompton v. Lea, L. R., 19 Eq., 115.

Pollution of Stream—Damage to Defendant Considered.—An injunction is always a high exercise of power, to be very cautiously exerted; but where large and expensive works are sought to be stopped for something incident to a lawful employment, and not on account of direct or willful encroachment, as in this case, of a water company against a mining company for incidental pollution of a stream, it should clearly appear that it is a case for equitable intervention; that there is no adequate remedy at law, and that irreparable injury will ensue.

New Boston Coal Co. v. Pottsville Water Co., 54 Pa. St. 164.

A preliminary injunction for nuisance in fouling water must stand or fall on the merits it possessed at the granting of the injunction; and the evidence not being clear that the pollution had actually occurred at that time, the court refused to make it perpetual and dissolved it.

New Boston Coal Co. v. Pottsville Water Co., 54 Pa. St. 164.

In such a case as presented there must be a clear showing on the question of inability to be compensated for the wrong.

New Boston Coal Co. v. Pottsville Water Co., 54 Pa. St. 164.

Lowering Dam—Nuisance.—Where defendants erected a dam which overflowed plaintiffs' placer claim with the water of the mill-pond: held, a nuisance, and that the proper decree should order a reduction of the dam such number of feet as would remove the overflow, with a perpetual injunction to restrain the raising of the dam above such point.

Ramsay v. Chandler, 3 Cal. 90.

Working under Canal—Statutory Limit.—By a canal act, mines and minerals were reserved to the owners of the land with the

right to get such minerals, but not so as to injure navigation; by subsequent sections, owners were prohibited from working within ten yards of the canal without the consent of the proprietors of the canal, who might either consent or compensate the owner for the minerals within that distance: held, that the owners should be enjoined from working at any distance from the canal in cases where actual injury to the canal would result, upon paying compensation the same as if the minerals were within the limit of ten yards.

Midland Railway Co. v. Cheekley, L. R., 4 Eq., 24.

Pleading.—A complaint alleging that plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction.

Tuolumne Water Co. v. Chapman, 8 Cal. 392.

The allegation in the complaint, that defendants wrongfully claim some pretended and fictitious right to the use of the water, does not prejudice the right of the plaintiff to the injunction.

Tuolumne Water Co. v. Chapman, 8 Cal. 392.

Conditional Relief.—If a party owns a ditch and the right of way from the same to conduct water for mining purposes, and has acquired such right by priority of location, the court should not, in an action to enjoin another party from washing away the ground over which it passes, limit the plaintiff's right by imposing conditions.

Gregory v. Nelson, 41 Cal. 278.

A judge at chambers has no power by *ex parte* order to induct defendants into possession of mining ground held by complainants, although after general verdict for the defendants.

Brennan v. Gaston, 17 Cal. 375.

Proceedings for contempt against parties refusing to comply with such order partake of the invalidity of the order itself.

Brennan v. Gaston, 17 Cal. 375.

Possession of the subject-matter of controversy is property, and can not be disposed of except in due course of law.

Brennan v. Gaston, 17 Cal. 375.

Surrender of Possession.—To justify the interference of equity, the complainant must in general be in possession or have established his right at law, or brought an action to recover possession, or his exclusive right must be admitted by defendant, and the court will, in all such cases, proceed with great caution.

Bracken v. Preston, 1 Pinn. 584.

Although a defendant to a bill for injunction does not show a legal right to possession, yet as a court of equity has no direct jurisdiction to try title (except in certain difficult and complicated cases affording some peculiar ground for equitable interference), it will not decree that the defendant surrender possession.

Bracken v. Preston, 1 Pinn. 584.

§ 696. *Stockholders against Trustees.*—The board of trustees of a mining corporation, denying the corporate ownership and asserting title in their own right, and working the lode for their own benefit, may be enjoined at the suit of one or more stockholders; and in such case evidence of title in the corporation, and the entry by defendants as the trustees of such corporation, will support a finding in favor of the plaintiff as to ownership.

Parrott v. Byers, 40 Cal. 614.

Special Case.—A mining company having found a portion of its ground covered by the claim of another company, whose stock was held only at a nominal value, bought up the entire amount of such stock. Afterward such stock was lost, or, as averred by complainant, stolen, and came into the hands of parties who proceeded to control the corporation by representing such stock, and to act adversely to the company which had bought up the stock. Defendants filed no answer: held, that the complaint presented a *prima facie* case for relief in the discretion of the court, the exercise of which discretion in the court below should not be disturbed.

Sierra Nevada M. Co. v. Sears, 10 Nev. 317, Beatty, J., dissenting.

Assessments—Selling Stock.—The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law.

Sullivan v. Triunfo G. & S. M. Co., 29 Cal. 585.

Mortgaged Mine.—Capner sold his farm to a mining company by articles in which the payment of certain installments of pur-

chase money was secured by a clause to the effect that he should have all the remedies of a mortgage. In other clauses, the fact of the sale being for mining purposes appeared. The vendor sued to foreclose, and prayed for an injunction meanwhile. Injunction refused, the carrying on of a mine upon premises purchased and occupied for mining purposes not being waste.

Capner v. Flemington M. Co., 2 Green Ch. 467.

To Restrain Sale till Title Settled.—Where a purchaser of mining lands, machinery, and slaves gave a mortgage on the property to secure purchase money, and on account of difficulties arising in the title to portions of the property, mines, and slaves, it was agreed in writing that on certain conditions as to interest and a sum down, that payment of the residue should be postponed until certain suits were settled: held, that equity ought to restrain the sale while the title was in doubt as long as the conditions were complied with.

High Shoals M. Co. v. Grier, 4 Jones Eq. 132.

§ 697. *Smelting-works.—Nuisance.*—H. sold land to persons who were described in the conveyance as copper-smelters and copartners, and as purchasing for the purposes of partnership; and who, between between the contract and the conveyance, nearly completed smelting-works on the lands. H. subsequently sold neighboring land to the plaintiff, who bought with full notice of the existence of the copper-works. The plaintiff recovered judgment at law, with substantial damages for injury done to his land by the smoke of the works, and then filed his bill for an injunction. Wood, vice-chnacellor, held that the plaintiff's having come to the nuisance did not disentitle him to equitable relief; and that H.'s having sold the site of the works with full knowledge that such works would be erected on it did not disentitle him, or those claiming under him, to complain of any nuisance which the works might occasion, and his honor granted an interlocutory injunction: held, on appeal, that the injunction had been rightly granted.

Tipping v. St. Helen's Smelting Co., L. R., 1 Ch. App., 66; see case at law between same parties, 4 B. & S. 608, 616; 5 Id. 935; 35 L. J. Q. B. 66.

Salt Well—Facts Doubtful, and Inspection Impossible.—A motion was made for an injunction to restrain the defendants from proceeding with a shaft and other works by which the plaintiff was apprehensive that his brine pit and apparatus for the manufacture of salt would be irremediably injured. The evidence of

the plaintiff and that of the defendants was altogether conflicting, and an inspection of the defendants' shaft was impracticable, in consequence of being filled with brine. The court refused an injunction, and directed that the costs of the defendants should be costs in the cause; but that the question whether the plaintiff's costs ought to be costs in the cause should stand over till the hearing.

McCurdy v. Noak, 17 L. J. Ch. 165.

Injunction after Verdict—Protecting Orchard.—Plaintiff had taken up and for eight years had occupied, under the possessory act of California, a tract of 212 acres, a part of which he had planted as an orchard. Defendants entered and located a mining claim within the tract, and washed away the fruit trees. Defendants claimed the right to occupy for mining purposes, tendering to plaintiff what they considered the value of the fruit trees. Plaintiff obtained temporary injunction, and afterward damages in trespass, but the court refused to grant a perpetual injunction: held, on appeal, that the verdict in trespass was conclusive of the rights of the parties, and the plaintiff was entitled to a perpetual injunction.

Daubenspeck v. Gear, 18 Cal. 443.

§ 698. *Cestui Que Trust not Entitled to Injunction.*—Where A., one of several *cestuis que trust*, filed his complaint under the code praying for the recovery of land and damages, and also an injunction to restrain the defendants from mining said land: held, that as he must necessarily fail in sustaining his demand for the land, on account of not being the legal owner, he was not entitled to an injunction.

Gillett v. Treganza, 13 Wis. 472.

The holder of the legal title (trustee) may have a temporary injunction, pending the trial of an action of ejectment or of waste, or the final hearing of a bill praying for a perpetual injunction; or the equitable owner may have like relief, either under the general powers of a court of equity or under the code.

Gillett v. Treganza, 13 Wis. 472.

Fraudulent Re-entry.—Where upon sale of a quarry, with agreement by vendee to supply vendor with marble therefrom, reserving right of entry to take the marble himself in case the vendee failed to supply it, the vendor had entered upon a pretense of failure which did not exist: held, that the vendor was rightfully enjoined from preventing complainant resuming pos-

session for any cause theretofore existing, but that such decree should leave intact his right of entry for any breach which might afterward exist.

Ruthland Marble Co. v. Ripley, 10 Wall. 339.

§ 699. *Patent to Quarter-section Containing Lode.*—Perpetual injunction granted to restrain defendant holding a patent of the United States upon a quarter-section entered and patented as agricultural land upon which in fact a lode location, under the mining act of 1866, existed at the time of the entry and patent, from asserting any title to the lode, and from in any manner interfering with the plaintiff in working the same, upon the assumption that such patent conveyed no title against the mining locator.

Gold Hill Q. M. Co. v. Ish, 5 Or. 104.

Rights between Partners.—Injunction granted *ex parte* to restrain the negotiation of a bill of exchange, accepted by a partner in a colliery in the firm name for his private debt.

Hood v. Aston, 1 Russ. 412.

Dissolution of Injunction—Legal Construction.—Complainants were the undisputed owners of all the franklinite and iron ores upon a certain tract when they were found separate from the zinc, and claimed to own all such ores, whether separate from the zinc or not. Defendants were the undisputed owners of all the zinc and ores other than franklinite or iron, and claimed to own the franklinite and iron ores when they did not exist separate and distinct from zinc ores. It appeared that the ores or minerals were so combined as to render it often difficult to decide which metal preponderated in quantity or value in a given specimen, and so as to render it difficult if not impossible to mine either one without at the same time taking the other. Upon motion to dissolve injunction, held: 1. That the dispute was not about facts, but was a question of legal construction, and of the proper interpretation of the grants of the mining rights; 2. That the matters in controversy were not of such a nature that a denial by the answer would entitle the defendants to a dissolution of the injunction as a matter of course.

Boston Franklinite Co. v. N. J. Zinc Co., 13 N. J. Eq. 216.

Possession.—In the matter of restraining threatened irreparable injury by mining, it is a matter of indifference whether the plaintiff is in or out of possession.

Moore v. Massini, 32 Cal. 590; Chapman v. Toy Long, 4 Saw. 33.

An injunction will be allowed to restrain the working of a placer claim located by the complainants under the United States mining acts, although prior to such location, and at the time of the commencement of the suit, the premises were, and continued in the possession of other parties, those parties being aliens (Chinese), who have no right since the passage of the mining acts to appropriate the public domain.

Chapman v. Toy Long, 4 Saw. 35.

Possession need not be recovered in an action at law prior to the granting of an injunction to restrain the removal of the gold from a placer claim. An injunction is not allowed in all cases of trespass upon mines, upon the ground that they are or may be an irreparable damage to this species of property.

Chapman v. Toy Long, 4 Saw. 35.

Patented Premises.—When premises containing gold are held under patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises for the purpose of extracting the gold.

Henshaw v. Clark, 14 Cal. 160.

Such injuries are calculated to destroy the entire value of the land for all useful purposes; they are irreparable.

Henshaw v. Clark, 14 Cal. 160.

Waste and Trespass.—The technical distinction between waste and a mere trespass has been long disregarded by courts of equity, and the rule now is, that wherever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, an injunction will be allowed the same as if it were a case of waste.

Chapman v. Toy Long, 4 Saw. 28.

Technical, Distinguished from Destructive, Trespass.—The construction of a ditch across rocky, barren, and uncultivated land is not an irreparable injury. The distinction between technical trespass and trespass going to the extent of irreparable injury is the foundation of the jurisdiction of equity in the latter class of cases, and trespass in the former class of cases will not be enjoined although the plaintiff's legal right to the land may not be denied, the defendants being solvent and able to respond in damages.

Thorn v. Sweeney, 12 Nev. 251.

§ 700. *Mineral Springs—Trade-mark.*—The owner of a peculiar product of nature, like natural mineral water, who has applied to it a conventional name, by which it has become generally known, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article.

Congress & Empire Spring Co. v. High Rock Spring Co., 45 N. Y. 291;
Dunbar v. Glenn, 43 Wis. 118.

A defendant owning a mineral spring alleged to have exactly the same properties as the mineral spring of the plaintiff, twelve hundred feet distant, enjoined from the use of term "Bethesda mineral water," or using the trade-mark "Bethesda," under which name, duly entered in the United States patent-office, and used as a brand on the barrels of plaintiff, plaintiff had introduced the water from her spring into the market, and thereby acquired a reputation, giving commercial value to the waters of the spring owned by her.

Dunbar v. Glenn, 43 Wis. 118.

Where the plaintiffs are purchasers of the spring, and all the interests of the original proprietors who invented and used the word "Congress" as a trade-mark, they are entitled to relief by injunction against sellers of mineral waters attempting to appropriate such words as descriptive of the water sold by them.

Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291.

Making Brick.—Lessee for years, without impeachment of waste, enjoined from converting the soil into brick, at the suit of a remainderman, upon the ground of its being a destruction of the inheritance, but allowed to carry off the brick already made.

Bishop of London v. Webb, 1 P. Wms. 527.

§ 701. *Equity Jurisdiction.*—Defendants' well having struck oil before the hearing, which, from its situation, decreased the flow of complainants' well, an accounting was had, based upon the yield of the respective wells: held, that the jurisdiction of the court extended beyond the writ of injunction, and a decree for the damages was ordered.

Allison & Evans' Appeal, 77 Pa. St. 221.

A court of equity will decree an account of waste at the same time with an injunction, and make such decree as will settle the entire controversy.

Allison & Evans' Appeal, 77 Pa. St. 221.

Inequitable Motives not Aided.—Where a party bought lands on the bank of a stream with the sole purpose of forcing their repurchase at a great advance by the proprietor of a costly quartz-mill above, a necessary consequence of the operations of such mill being that large quantities of mill-tailings were continually deposited by the stream on the lands below, so purchased by complainant: held, that the complainant's motive in purchasing might be inquired into, and that instead of granting an injunction to restrain such injury, which would sacrifice valuable property, the court would leave complainant to his remedy in damages.

Edwards v. Allonez M. Co., 6 Central Law J. 189, Dillon, J., Sup. Ct. Mich. 1878.

Non-resident Defendant.—The residence of one of several tort-feasors, without the jurisdiction of the court, can not be alleged to prevent the exercise of the authority of the court upon the property; and his name may be dropped by amendment (he not appearing and not being served), without prejudice to a motion for injunction.

Cole S. M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors who resides out of the jurisdiction of the court may be omitted, and (not having been served) the court will not allow an amendment by dropping his name, without prejudice to a motion for injunction.

Cole S. M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

Non-residents owners or claimants out of the jurisdiction of the court, working a mine by their agents, held not necessary parties defendant to a bill for injunction.

United States v. Parrott, 1 McAll. 271.

§ 702. *Temporary Injunction to Prevent Inundation.*—On a bill for an injunction to protect the plaintiffs' coal mines from injury by the water flowing to them from the defendants' colliery, the court, on motion, granted an injunction restraining the defendants from working their coal mines in any places which might injure or endanger the plaintiffs' mines, until answer or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence, and the cause was brought to a hearing, when the court refused, until the plaintiffs had established their right at law, to make the injunction perpetual, but retained the bill for a year, giving the

plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the mean time. The defendants' mine overlaid that of plaintiff, and danger of inundation was alleged. The temporary writ was allowed on the facts of the particular case, in the discretion of the chancellor, without deciding any point of law or fact.

Duke of Beaufort v. Morris, 6 Hare, 340.

Temporary Writ Pending Question of Jurisdiction.—Where proper averments are made in a bill as to jurisdiction, they impart a *prima facie* jurisdiction to the court, and enable it to do justice between the parties in case of irremediable mischief (the working of a gold mine), by the issue of a temporary injunction until the plea to the jurisdiction is disposed of; the plea does not oust the jurisdiction, but it ought to be disposed of speedily.

Fremont v. Merced M. Co., 1 McAll. 267.

Requisite for Bill—Case for Interlocutory Writ Pending Ejectment.—Where a bill was brought alleging a continuing trespass by mining copper ore, showing that the complainants had been disseised, and praying an injunction pending an action for forcible entry and detainer, and for an account of mineral extracted, and for decree that defendants surrender possession and that the complainants be quieted in their title; and it appeared that the defendants were in possession under claim of right; held, that the bill did not state a case entitling them to relief; that ejectment was the proper remedy with a preliminary injunction on a proper bill showing the pendency of such action to try title, and that after recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits.

Bracken v. Preston, 1 Pinn. 584.

§ 703. *Interlocutory, at Chambers—Appeal.*—The order of a district judge at chambers, granting an injunction *ex parte*, is virtually the act of the court, and may be enforced in the same way, or may be appealed from without preceding such appeal by a motion to dissolve.

Sullivan v. Triunfo G. & S. M. Co., 33 Cal. 385.

Not granted before answer or default.

Sullivan v. Triunfo G. & S. M. Co., 33 Cal. 385.

§ 704. *Mandatory.*—Tenant of a coal mine who had worked the same contrary to his covenants, and opened a communication with another mine, enjoined from "draining any other mines,

or permitting the same to be drained by means of the demised colliery, and from permitting any water to flow" through the communication made "into the demised colliery," the effect intended being to compel the defendants to close the communication.

Mexborough v. Bower, 7 Beav. 127.

Mandatory, Effect of.—The form of a mandatory writ in respect to repairing canals used by a colliery avoided, but the effect obtained by the wording of the order.

Lane v. Newdigate, 10 Ves. 193.

Mandatory to Compel Removal of Débris.—If a party who has condemned land for private purposes, as a railroad from his mine, causes *débris* from his mine to be deposited on the land through which his right of way is exercised, he may be compelled to remove it.

Lance's Appeal, 55 Pa. St. 17.

To Compel Defendant to Bulkhead Tunnel—Tapping Underground Current.—Where defendants, by means of a tunnel run into the mountain at a lower level than complainant's tunnel, wrongfully intercept water appropriated by complainant and flowing in its tunnel, a preliminary injunction will be granted, restraining the continuance of such diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead or dam across their own tunnel.

Cole S. M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

Mandatory Writ to Compel Colliery to Stop up Openings.—The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the neighboring and adjoining mine of the plaintiffs to be flooded, and from such openings the defendants had also abstracted coal from their neighbor's mine, and sold the same for their own benefit. The bill therefore prayed that the defendants, their agents, etc., might be restrained from further digging any coals or carrying any workings into or under said lands. That they might also be restrained from making any cuts or openings or channels or pipes, or from doing any other acts to conduct water from any of the upper seams within their mines into the lower seams, so as to send such water through such lower seams into the plaintiff's mines; that defendants might also be ordered to stop up the openings and communications made by them from their mines into the plaintiff's mines, and to prevent by sure

and sufficient barriers the water conducted by such cuts or openings or channels or pipes, into the lower seams from passing through such lower seams into plaintiff's mines. The bill also prayed for an injunction to restrain the defendants from getting more coal from said colliery, and for an account and compensation: held, that it was a clear case for an injunction, according to the prayer of the bill, and for an account, and also for the cost of "ascertaining the openings in the defendant's mine which had caused the injurious flow of water." (*Per vice-chancellor.*)

Plant v. Stott, 21 L. T., N. S., 106.

Mandatory Writ before Hearing—Diversion of Underground Stream.—Plaintiff in excavating a tunnel to its mining claim on the public lands of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain to a point directly under and some thirty feet below the point where the plaintiff obtained said water, whereupon the water was diverted from plaintiff's tunnel into the tunnel of defendants, and by them appropriated to their own use: held, that such diversion was wrongful, and that plaintiff was entitled to an injunction. *A preliminary and mandatory writ was granted.*

Cole M. Co. v. Virginia W. Co., 1 Saw. 470, 686.

Irreparable Injury, how Stated.—The mere statement that injury is irreparable by reason of defendants taking ores, and the impossibility of ascertaining the amount and value thereof, is not a sufficient statement of irreparable injury. "The facts should be stated from which the court could learn that the taking and selling the ores would be such injury."

Leitham v. Cussick, 1 Utah, 242.

Pending Trial at Law.—Lord of the manor restrained from opening mine on copyhold lands pending trial of the question at law of his right so to do.

Grey v. Northumberland, 13 Ves. 236; S. C., 17 Id. 281.

§ 705. *When Should not Issue.*—To entitle a party to injunctive relief—the restraining of defendants in possession from operating a mining claim—the plaintiff's title must be shown to be clear and undisputed, or it must appear that steps have been taken to establish the title at law, or valid and satisfactory reasons be shown for not doing so. It would be gross injustice to allow a

temporary injunction, when upon the face of the papers it appears that a perpetual injunction could never be granted.

Old Telegraph M. Co. v. Central Smelting Co., 1 Utah, 331.

As no perpetual injunction could be sustained on a bill to restrain the working of a mining claim without establishing the title at law, no temporary injunction should be allowed to restrain such working in the absence of any suit to try title, or of excuse for not bringing one.

Old Telegraph M. Co. v. Central Smelting Co. 1 Utah, 331.

Judicial Notice of Suits Affecting the Mine.—In applications for injunction a judge may take judicial notice of the files of his own court showing suits involving the legal title to the property.

Lyon v. Woodman, 3 Leg. Gaz. 81.

And the failure to diligently prosecute such suits is a ground for refusing an injunction.

Lyon v. Woodman, 3 Leg. Gaz. 81.

Before Title Established.—A court of equity will rarely restrain by injunction the working of mines until the title is established at law.

N. J. Zinc Co. v. N. J. Franklinite Co., and Boston Franklinite Co. v. N. J. Zinc Co., 13 N. J. Eq. 323; S. C., 14 Id. 308.

Suit at Law.—Chancery has jurisdiction to preserve the subject-matter by injunction, pending proceedings to try the right thereto, and it is not indispensable that there should be a particular form of suit, or that it should be in a court of law, if the proper steps are being taken to decide title; *e. g.*, by proceedings under a special act of congress.

U. S. v. Parrott, 1 McAll. 271.

Issues of Law.—A court of equity (upon bill to restrain working of a gold mine) will not try the legal rights of parties to real estate.

Irwin v. Davidson, 3 Ired. Eq. 311.

Title in Dispute—Practice.—Courts of equity will not usually grant a perpetual injunction in case where the title to the premises is put in issue, and where, from the evidence, the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the chancellor may hear evidence on this point notwithstanding.

Lockwood v. Lunsford, 56 Mo. 68.

Title Disputed.—The rule that an injunction will not issue where the denial of title by the defendant is positive, is not inflexible.

Merced M. Co. v. Fremont, 7 Cal. 317.

The allegation in complainant's bill that defendants justify under an adverse claim to the mine will not in any sense prejudice the plaintiff's right to an injunction.

Merced M. Co. v. Fremont, 7 Cal. 317.

Title Admitted by Demurrer.—There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer.

Tuolumne W. Co. v. Chapman, 8 Cal. 392.

Injunction where Plaintiff Prevents Fair Trial.—Whether after a verdict at law in an action of trespass the court will grant an injunction against future trespass in favor of parties who refused at the trial to produce documents necessary to a fair decision, *quære*.

Field v. Beaumont, 1 Swans. 204.

Injury to Workings Considered—Speedy Trial.—The local means of working coal mines, the damages arising from delay in opening them, or the loss of the opportunity of working them in connection with contiguous mines, are to be considered upon the question of injunction.

Grey v. Northumberland, 17 Ves. 281; S. C., 13 Id. 236.

And an injunction upon these considerations ought not to be continued unless a speedy trial of the issue at law be insured.

Grey v. Northumberland, 17 Ves. 281; S. C., 13 Id. 236.

General Relief—Prayer.—General relief should not be granted on a bill praying only the issuance of an injunction.

Boyle v. Laird, 2 Wis. 316.

Prayer.—A decree of injunction can not be rightfully extended beyond the prayer of the bill.

Leitham v. Cusick, 1 Utah, 243.

§ 706. *Answer.*—Where the answer to a bill for injunction (to restrain the working of a mine) fully and fairly denies both the title and possession of the complainant, no testimony being taken, and the case standing on the pleadings alone, the injunction should be dissolved until good reason appear for continuing it. "But no reason appears to make this an exceptive case"

(it being an ordinary case of alleged taking of ore by mining out of a mine claimed in fee by complainant).

Magnet M. Co. v. Page, 9 Nev. 348.

There are exceptions to the rule that the court will not decree an injunction where the material averments of the bill are traversed by the answer, but no special reason for exception appears in this case (the case being to restrain waste by mining, but no particulars appearing in the report).

Lady Bryan G. & S. M. Co. v. Lady Bryan M. Co., 4 Nev. 415.

Practice—Answer.—Upon a hearing in case of waste upon bill and answer alone, the denial of the commission of waste made in the answer is to be taken as true.

Reed v. Reed, 16 N. J. Eq. 248.

Denial of Equities—Affidavits.—Where the answer to bill for injunction (to restrain mining upon a quartz ledge claimed by both parties) denies all the equities of the bill, and the bill is not supported by affidavits, the injunction must be dissolved.

Real del Monte G. & S. M. Co. v. Pond G. & S. M. Co., 23 Cal. 82.

Equities Denied—Answer Unsupported.—Upon bill for injunction to restrain the working of a ledge of silver ore, where the answer denied all the material averments of the bill, and the bill wholly unsupported by affidavits or other evidence, and the case submitted for hearing on the pleadings: held, that the refusal to dissolve the injunction was error.

Johnson v. Wide West M. Co., 22 Cal. 479.

The entire equity of the bill in such a case being denied by the answer, and there being no support to the bill, the injunction should be dissolved.

Johnson v. Wide West M. Co., 22 Cal. 479; Burnett v. Whitesides, 13 Id. 156.

Denial of Equities.—Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, it "denies the equity of the bill," and acting upon it as evidence, the injunction will be dissolved by the court in the absence of extraordinary circumstances.

United States v. Parrott, 1 McAll. 271.

Denial of Fraud.—Where fraud, forgery, and antedating are distinctly alleged in the bill, and the only denial of them is on "information and belief," it is not a "denial of the equity of

the bill," and can not arrest the issue of an injunction, or authorize a dissolution of it if one has been granted.

United States v. Parrott, 1 McAll. 271.

Answer—Information and Belief.—The court will not dissolve a preliminary injunction upon a denial of the equities of the bill upon information and belief, nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief.

Cole S. M. Co. v. Virginia W. Co., 1 Saw. 686.

Matter in Avoidance.—On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill should be deemed, on such motion, equivalent to an affidavit by the defendant. Such matters, on final hearing, must be proved by the defendant.

United States v. Parrott, 1 McAll. 271.

Answer—Affidavits.—As to the effect of answer and affidavits in general and special injunctions, see *Maden v. Veevers*, 5 Beav. 503.

Affidavits.—Neither bill nor answer can be supported by affidavits as to title. So held on motion to enjoin working New Almaden quicksilver mine.

United States v. Parrott, 1 McAll. 271.

The admissibility of affidavits on the question of waste considered.

United States v. Parrott, 1 McAll. 271.

Waste—Affidavits.—It seems affidavits may be read by the plaintiff in contradiction of an answer that acts of waste were not done or threatened.

Norway v. Rowe, 19 Ves. 144.

Waste—Practice.—It has become almost a matter of course to grant an injunction to stay waste.

Smith v. City of Rome, 19 Ga. 89.

Incidental Account for Waste.—An account for waste done is incidental to relief by injunction against future waste, and is directed on the principle of preventing multiplicity of suits.

Ackerman v. Van Houten, 4 Halst. Ch. 476.

Account, when Incidental.—Distinction between the cases in which the right to an account is incident to the injunction and the cases where it is independent of such relief, with especial reference to the case of mines and timber.

Parrott v. Palmer, 3 Myl. & K. 632.

Accounting.—Upon a bill going only for an injunction to restrain part owners from interfering with lessee's salt-works, an accounting can not be ordered.

Stuart v. White, 25 Gratt. 300; Mitchell v. McCall, Id.

But in connection with another bill between owners in the same court, the order to account may be made in both cases.

Stuart v. White, 25 Gratt. 300; Mitchell v. McCall, Id.

With Account—Plaintiff Disseised.—No injunction will be allowed in cases of trespass with an account, where the complainants (being disseised) can not maintain an action for mesne profits.

Bracken v. Preston, 1 Pinn. 584.

Practice—Copyhold—Answer—Title.—Preliminary injunction granted to restrain the working of mines recently opened upon bill charging the lands to be copyhold, although the answer denied such averment, and asserted positively that they were freehold, and therefore belonging to the defendant; the court refusing, upon the special facts stated, to direct plaintiff to bring his action, the bill setting forth facts in support of the complainant's claim not denied by the answer.

Greenwich Hospital v. Blackett, 12 Jur. 151.

Nonsuit—New Trial.—A dissolution of a preliminary injunction should be granted upon a nonsuit as a matter of course; but if the cause is remanded for a new trial, the complainant is entitled to a renewal of the injunction.

Harris v. McGregor, 29 Cal. 124.

Dissolution.—An injunction granted at chambers without notice may be dissolved without notice.

Leitham v. Cussick, 1 Utah, 242.

But the order of dissolution can go no further than to undo the original order; it can not, before notice, order the reinstatement of parties dispossessed under the original order.

Leitham v. Cussick, 1 Utah, 242.

§ 707. *Insolvency.*—Where irreparable injury or inadequate relief at law is alleged, insolvency of the defendant need not be superadded.

Sierra Nevada M. Co. v. Sears, 10 Nev. 317.

Gold Mine—Insolvency—Effect of Answer.—Upon answer distinctly denying the equities of a bill, an injunction will be

denied. But an injunction granted on a bill based upon title in the complainant, the great value of the land as a gold mine, and the irreparable injury by defendants' digging the gold, and the insolvency of the defendants, will not be dissolved upon an answer setting up an affirmative title in the defendants, and denying no allegation of the bill except title and insolvency.

Moore v. Ferrell, 1 Ga. 7.

Insolvency—Laches.—In view of the injury to a mine by suspending operations and the ruin of the machinery, and in consideration of five years' delay in bringing action, the insolvency of a defendant sought to be enjoined becomes immaterial.

Irwin v. Davidson, 3 Ired. Eq. 311.

Water Insolvency, etc.—An injunction to restrain the diversion of water ought not to be granted unless equitable circumstances, beyond the mere allegations of irreparable injury be shown; as insolvency, impediments to a judgment at law, or to adequate legal relief, or threatened destruction of the property, or the like.

Burnett v. Whitesides, 13 Cal. 156.

Trivial Damage—Insolvency—Discretion.—Upon bill for injunction to restrain miners from undermining the improvements on a milk ranch, where the court in its discretion refused the writ, the damage threatened being trivial: held, not such abuse of discretion as to be interfered with, although insolvency of the defendants was alleged in the bill, it being denied in the answer.

Slade v. Sullivan, 17 Cal. 103.

After New Trial Granted.—If, in an action to try the right to a mining claim, a preliminary examination is granted on plaintiff's motion, and upon appeal to the supreme court a judgment in favor of plaintiff is reversed and a new trial granted, this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction.

Hess v. Winder, 34 Cal. 270.

§ 708. *Practice after Recovery in Trespass in California.*—In an action for a trespass upon a mining claim, where the complaint avers that the defendants are working upon and extracting the minerals from the claim, and prays for a perpetual injunction, and the answer admits the entry and work, but takes issue upon the title, if a jury to whom the issue of title is submitted find in favor of the plaintiffs, it is the duty of the court to decree the

equitable relief sought, and enjoin defendants from future trespasses.

McLaughlin v. Kelly, 22 Cal. 211.

The complaint charged that the defendants had wrongfully entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiff, and had extracted therefrom gold-bearing earth of the value of \$1,000; and that they threatened to continue their wrongful acts, and prayed for damages in the sum of \$1,000, and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiffs, and denied that they had worked upon any portion than that to which they thus asserted title.

McLaughlin v. Kelly, 22 Cal. 211.

Plaintiffs sued for damages by reason of alleged trespasses upon a certain portion of quartz mining claim, averred in the complaint to be the property and in the possession of the plaintiffs, and alleging further the insolvency of defendants, asking an injunction against further trespasses, which was granted. The defendants denied all the allegations of the complaint, and averred ownership. The jury found generally for the defendants, but the court below refused to dissolve the injunction: held, 1. That the action amounted to an action of trespass, with an injunction in aid; 2. That the action having failed, the injunction should go with it; 3. That an ancillary writ should abate with the suit which it supported, plaintiffs having failed to prove that which would have been necessary to maintain their suit; although the action need not be considered as deciding the question of title, nor as debarring plaintiffs from proceeding for original relief for irreparable injury going to the destruction of the inheritance.

Brennan v. Gaston, 17 Cal. 372.

California Practice.—A claim for damages for trespass committed, and a prayer for injunction to prevent further waste, may be joined in the same complaint.

Moore v. Massini, 32 Cal. 590.

Defendants being enjoined from working a mine, it does not follow that a receiver should be appointed to take charge of it; such appointment must depend upon circumstances.

United States v. Parrott, 1 McAll. 271.

Definite Decree—Railroad Bridge.—In injunction against mining, “in such manner as to affect the stability of the Victoria

bridge, or the railway, or other works of the plaintiffs in the bill mentioned," is not too indefinite. The distance within which the works of the mine could approach could not be determined *a priori*, and the defendant is bound at his peril to observe the rule as expressed in the writ.

North Eastern R. Co. v. Elliott, 30 L. J. Ch. 160.

Appearance—Practice.—A court of chancery, where the sole object of a bill filed is to obtain an injunction, will not allow that object to be resisted without holding the defendant to a general appearance in the action.

Thornborough v. Savage M. Co., 1 Pac. Law Mag. 267, U. S. C. Ct., Baldwin, J.

Contempt.—When an injunction granted on an *ex parte* application was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: held, that subsequent acts of defendant in violation of the original injunction were not in contempt.

Fremont v. Merced M. Co., 9 Cal. 19.

The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal; but he can not have a *mandamus* to compel the issuance of attachment for contempt.

Fremont v. Merced M. Co., 9 Cal. 19.

Writ against Mine in Another County.—The court of chancery, in a county where the parties are found within the jurisdiction of the court, may grant an injunction to prevent the opening or working of mines situate in another county, and enforce the writ through the defendants personally.

Munson v. Tryon, 6 Phila. 395.

Injunction against Plaintiffs—Utah Practice.—Where plaintiffs allege ownership of a lode claim, and prayed an injunction to restrain defendants' working, and the defendants' answer not only denied plaintiffs' allegations, but stated that plaintiffs were working the lode and property of the defendant: held, that under the practice act of Utah the court had power to enjoin the plaintiffs from working.

Smith v. Richardson, 1 Utah, 245.

§ 709. *On Appeal—Interference with Injunction Pending Appeal.*—Plaintiffs obtained a preliminary injunction restraining defendants from obstructing a road leading to plaintiffs' mine. Upon the answer being filed the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the

injunction, the judge below thereupon made an order that, upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction pending the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: held, that the application must be denied, if the court had the power to grant it; that the remedy of plaintiff under the reviving order was ample to protect him until the appeal could be heard, or the injunction be dissolved by some competent authority.

Eldridge v. Wright, 15 Cal. 89.

Interference of Supreme Court.—Instance of reversal of decree of the lower court refusing an interlocutory injunction reversed by the supreme court, the court below being ordered to issue the writ.

Whitman M. Co. v. Baker, 3 Nev. 386.

Defendant Entering by Collusion with Tenant.—Defendant asserting title, but admitting that he obtained possession through plaintiff's tenant, without plaintiff's knowledge, enjoined upon the ground of the mode of his entry.

Anonymous case cited in Norway v. Rowe, 19 Ves. 144.

Misnomer of Immaterial Party.—In an action for an injunction to stay waste, or the asserting of a hostile title by the defendants, and for an accounting, where the relief granted is limited to the injunction prayed for, the fact that a party, only necessary to that branch of the case which relates to the accounting, was sued by a wrong name (Washington Gold Q. M. Co. instead of Washington Q. M. Co.), does not operate to the prejudice of the defendant, and is immaterial.

Parrott v. Byers, 40 Cal. 614.

Costs, Discretionary.—Upon case of perpetual injunction against mining with verdict for damages, held, that the allowance of costs was discretionary with the court.

Esmond v. Chew, 17 Cal. 337.

CHAPTER XXXIX.

MINING CLAIMS BEFORE COURT 3.

COAL LANDS.

- § 710. Working on the Dip—Easement—Drainage—Flooding.
- § 711. Colliery—Definition, etc.
- § 712. Act of God.
- § 713. The Colliery Business is a Trade.
- § 714. Fixtures.
- § 715. Equity Jurisdiction.
- § 716. Judicial Sale.
- § 717. Evidence as to whether a Mine is Exhausted.
- § 718. Lord Rokeby's Case.
- § 719. Circular Instructions, April 15, 1880.

§ 710. *Working on the Dip—Easement—Drainage—Flooding.*—Where there are two mining operations, one owner working on the upper level and one on the lower level of the same vein, the owner of the upper level, operating in the most approved method and with care, is not required to control the natural flow of the water downward, and may work his coal out down to his line. And the owner of the subjacent level owns a servitude, and must leave a pillar of coal to support the gangway, and keep out the water from the level above. Adjoining owners of the same level of the same vein owe no special duty to each other.

When, however, the owner of the subjacent land has created a servitude upon his land in favor of the subjacent owner, such as a right to drive an air-way through his works and to connect with the surface, such owner, after he has worked all his coal out, and is about to abandon his workings, must give reasonable notice to the owner of the dominant tenement; and for failure so to do, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement; the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied. Reasonable notice is relative, and depends upon the work to be performed.

Philadelphia C. & L. Co. v. Taylor, 7 Pac. L. R. 127; 5 Leg. Gaz. 392; 1 Leg. Chron. 361.

§ 711. *Colliery—Meaning of the Term.*—The party claiming under an agreement to sell all of a certain "interest in the

shaft and slope collieries," offered to prove that the term "colliery" means a place where coal is dug or mined, embraces all the movable property of the mines, used or placed there to be used in the working of the mines, and was so understood by all persons engaged in mining in the county of Schuylkill, where the collieries were situate, which offer the court refused: held, that he had a right to prove its meaning, by the evidence of persons engaged in the same trade or business, as a term of art, and that the rejection of the offer was error. But the court did not err in refusing to define to the jury according to the meaning expressed in the offer; and that if it were taken from the lexicographers without the aid of testimony, it would express no more than "a place where coals are dug."

Cary v. Bright, 58 Pa. St. 70.

§ 712. *Act of God.*—A coal company, under its charter, constructed a railroad to connect with Lehigh navigation, which thus notoriously became indispensable for the transportation of its coal.

All contracts with the coal company were made in view of these facts. The coal company contracted with plaintiffs for the delivery of a large quantity of coal during a season. Before the time for delivery of a large part of the coal a flood swept away all the works of the navigation company, so that the coal company were prevented from filling their contract: held, that they were excused from compliance while so prevented.

Lovering v. Buck Mt. C. Co., 54 Pa. St. 291.

Access to Lower Level of Coal Seam through the Upper Level.—The upper veins of coal of a tract in the forest of Dean mining act, 1 and 2 Vict. 43, to the plaintiff, with a reservation that the underlying veins might be galed to other parties "but to be worked so as not to impede or injure the working of tracts already allotted." The veins underlying the plaintiff's colliery were afterwards galed to the defendant, who sank a shaft through the plaintiff's works: held, that the restriction applied only to the workings of the lower seams when reached, and did not abridge the right of the defendant to sink a shaft through the upper veins.

Gould v. Great Western D. C. Co., 2 De G. J. & S. 601.

§ 713. *Trade.*—A colliery is a species of trade; its incidents distinct from other landed property considered.

Williams v. Attenborough, 1 Turn. & R. 70.

Trading Concern.—A colliery is not only the enjoyment of the estate, but in part the carrying on of a trade. An engine for working it is to be regarded as a trade fixture.

Dudley v. Ward, Amb. 113; Wren v. Kirton, 8 Ves. 502.

Partnership.—A colliery worked by a partnership upon dissolution can not be parted—it must be sold.

Wilde v. Milne, 26 Beav. 504.

Account.—A colliery is a kind of trade, and therefore an account of profits may be taken in chancery.

Story v. Lord, 2 Atk. 630.

Grant to Colliery—Construed.—When the liberty of making a drain was granted for the purposes of an intended colliery, such grant remains, and the right of repair continues as long as the object of the grant, to wit, as long as the coal might last; and the colliery is not limited in the use of such drain to the working of particular veins, or to working under any particular closes or pieces of ground.

Hodgson v. Field, 7 East, 613.

§ 714. *Fixtures.*—There may be many things incident to a colliery as fixtures, though not actually affixed to the freehold, but the mere loose movables, in the absence of any usage or general understanding, would no more pass as such than the tools of a mechanic in the sale of his shop.

Cary v. Bright, 58 Pa. St. 70.

§ 715. *Equity Jurisdiction.*—In England a court of chancery will not undertake the working of a coal mine, or enter a decree which would involve the superintendence of the working of a colliery.

Wheatley v. Westminster C. Co., L. R., 9 Eq., 538.

§ 716. *Judicial Sale.*—The sale of a colliery in execution of a trust will not be set aside to let in a higher bid upon the same footing as real estate. The incidents attaching to it as a trade, and its liability to destruction, and to great fluctuations in value, considered.

Williams v. Attenborough, 1 Turn. & R. 70.

Judgment Creditors.—Judgment creditors seeking to enforce performance of an agreement for carrying on a colliery, so as to make it available as assets, must take it subject to all engagements as a continuing concern.

Burroughs v. Elton, 11 Ves. 29.

§ 717. *Evidence*.—Whether a coal mine is exhausted is a question of fact for the jury, and it is proper to hear evidence of usage or custom showing when a mine is deemed exhausted.

Walker v. Tucker, 70 Ill. 527.

Covenant not Implied.—A covenant in a lease of a colliery to work continuously, where not expressed, will not be implied.

Jejon v. Vivian, L. R., 6 Ch. App., 742.

§ 718. *Lord Rokeby's Case*.—By a deed of grant and license the licensee was empowered to win and work all and every or any of the coal mines, seam and seams of coal, under certain lands, and to reimburse himself all expenses incurred in the winning out of the profits from the sale of the coal, and it was provided that after payment to the licensee of all expenses in winning the said colliery, coal mine or coal mines, seam or seams of coal, he should pay the grantor such royalty for the coals yearly wrought out of the said coal mines, seam or seams, as should from time to time be awarded by two arbitrators, once in every five years, whilst the said coal mines, seam or seams of coal, should continue to be wrought. More than one seam of coal lay under the lands. The licensee after winning one seam went on to win another: held, by the house of lords (reversing the decision of the court of appeal upon this point), that the whole colliery was not won when the first seam was won, but that the deed was to read *separatim* as to the winning of each seam, and that the licensee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam.

Sir George Elliott v. Lord Rokeby, 7 App. Cas. 43.

§ 719. *Coal Lands*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 15, 1880. }

Gentlemen: The act of congress, approved March 3, 1873, entitled "An Act to provide for the sale of the lands of the United States containing coal," is as follows, to wit: Sections 2347, 2348, 2349, 2350, 2351, and 2352, revised statutes. See pages 14-16.

Your attention is called to the following points:

1. The sale of coal lands is provided for: 1. By ordinary private entry under section 1; 2. By granting a preference right of purchase based on priority of possession and improvement under section 2.

2. The land entered upon either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands, to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase; if an individual, he must be twenty-one years of age, and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons, each must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same state or territory.

6. Any individual may enter, by legal subdivisions as aforesaid, any area not exceeding 160 acres.

7. Any association may enter not to exceed 320 acres.

8. Any association of not less than four persons duly qualified, who shall have expended not less than \$5,000 in working and improving any coal mine or mines, may enter under section 2 not exceeding 640 acres, including such mining improvements.

9. The price per acre is \$10 where the land is situated *more* than fifteen miles from any completed railroad, and \$20 per acre where the land is *within* fifteen miles of such road.

10. Where the land lies *partly within* fifteen miles of such road and *part outside* such limit, the *maximum* price must be paid for all legal subdivisions the greater part of which lies within fifteen miles of such road.

11. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at \$20 per acre.

12. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

13. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly defined possession must be established.

14. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements

made must be such as to clearly indicate the good faith of the claimant.

15. The lands are intended to be sold where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines, in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2 by adverse claimants, as the circumstances of each case may justify.

16. In conflicting claims, where improvement has been made prior to March 3, 1873, you will, if each party make subsequent compliance with the law, award the land *by legal subdivisions*, so as to secure to each as far as possible his valuable improvements; there being no provision in the act allowing a joint entry by parties claiming separate portions of the same legal subdivision.

17. In conflicts, when improvements, etc., have been commenced subsequent to March 3, 1873, or shall be hereafter commenced, priority of possession and improvement shall govern the award, when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

18. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case, and forward the same to this office, accompanied by a statement of the facts as shown by your records.

19. Prior to entry, it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest, and substantiated by the affidavits of disinterested and credible witnesses.

20. Notice of contest, in every case where the same is practicable, must be made by reading it to the party to be cited and by leaving a copy with him. This notice must proceed from your office, and be signed by the register or receiver. Where such personal service can not be made by reason of the absence of the party, and because his whereabouts is unknown, a copy may be left at his residence, or, if this is unknown, by posting a copy in a conspicuous place on the tract in controversy, and by publication in a weekly newspaper having the largest general circulation in the vicinity of the land (where no newspaper shall

be specified by this office) for five consecutive insertions, covering a period of four weeks next prior to the trial; and in each case requiring such notice a copy must be forwarded with the returns to this office, accompanied with proof of service by affidavit indorsed thereon.

21. In every case of contest all papers in the same must be forwarded to this office for review before an entry is allowed to either party.

22. Thirty days from your decision will be allowed by you to enable any party to take an appeal, or file argument to be forwarded to this office.

23. No appeal will be entertained unless the same shall be forwarded through the district land office.

24. The party may still further appeal from the decision of the commissioner of the general land office to the secretary of the interior. The appeal must be taken within sixty days after service of notice on the party. This may be filed with the district land officers and by them forwarded, or it may be filed with the commissioner, and must recite the points of exception.

25. If not appealed, the decision is by law made final. See section 10, act of June 12, 1858, 11 Stat. 326. After appeal, thirty days are usually allowed for filing arguments, and the case is then sent to the secretary, whose decision is final and conclusive.

26. Manner of obtaining title: First, by private entry. The party will present the following application to the register, and will make oath to the same:

I,, hereby apply, under the provisions of the act approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," to purchase the quarter of section .., in township .., of range .., in the district of lands subject to sale at the land office at, and containing acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States) and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place

bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

.....

To this affidavit the register will append the usual *jurat*.

27. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of purchase money.

28. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the general land office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the commissioner at Washington or by the register at the district land office.

29. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by section 2.

30. Second, when the application to purchase is based on a priority of possession, etc., as provided for in section 2, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed, sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

31. The declaratory statement must be substantially as follows, to wit:

I,, being years of age, and a citizen of the United States (or having declared my intention to become a citizen of the United States), and never having, either as a member of an association, held or purchased any coal lands under the act approved March 3, 1873, entitled "An act to provide for the sale of the land of the United States containing coal," do hereby declare my intention to purchase, under the provisions of said act, the quarter of section .., in township .., of range .., of lands subject to sale at the district land office at, and that I came into possession of said tract on the day of, A. D. 18..., and have ever since remained in actual possession continuously, and have expended in labor and improvements on said mine the sum of dollars, the labor and improvements being as follows: [here describe the nature and character of the improvements]. And I

furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal.

.....

32. When the township plat is not on file at date of claimant's first possession, the declaratory statement must be filed within sixty days from the filing of such plat in your office.

33. When improvements shall have been made prior to June 4, 1873, the declaratory statement must be filed within sixty days from that date.

34. No sale under this act will be allowed prior to September 4, 1873. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment, but you will allow no party to make final proof and payment, except on notice as aforesaid to all others who appear on your records as claimants to the same tracts.

35. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government can not thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

36. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone, or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association. You are to allow no entry, under this act, of lands containing other valuable minerals. You will determine the character of the land under the present rules relative to agricultural and mineral lands. Those that are sufficiently valuable for other minerals to prevent their entry as agricultural lands can not be entered under this act.

37. Assignments of the right to purchase under this act will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which

dates from the first day of possession of the assignor who initiated the claim.

38. You will so construe this act in its application as not to destroy or impair any rights which may have attached prior to March 3, 1873. Those persons who may have initiated a valid claim under any prior law relative to coal lands will be permitted to complete their entries under the same.

39. You will report at the close of each month, as "sales of coal lands," all filings and entries under this act in separate abstracts, commencing with number 1, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands, you will continue the same without change. The affidavit required from each claimant at the time of actual purchase will be as follows, to wit:

I,, claiming the right of purchase under the act of congress entitled "An act to provide for the sale of the lands of the United States containing coal," approved March 3, 1873, to the quarter of section .., in township .., of range .., subject to sale at, do solemnly swear that I have never had the right of purchase under this act, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract, in labor and improvements, the sum of dollars, the nature of such improvements being as follows:; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than gold. So help me God.

.....

I,, of the land office, do hereby certify that the above affidavit was sworn and subscribed to before me this day of, A. D. 18...

.....

40. In case the purchaser shows by an affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

APPENDIX.

FORMS

FOR AGRICULTURAL AND OTHER LANDS.

Pre-emption Declaratory Statement for Offered Lands.

I,, of, being, have, on the day of, A. D. 18..., settled and improved the quarter of section No. ..., in township No. ..., of range No. ..., in the district of lands subject to sale at the land office at, and containing acres, which land had been rendered subject to private entry prior to my settlement thereon; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under section 2259 of the revised statutes of the United States. Given under my hand this day of, A. D. 18...

In presence of

Pre-emption Declaratory Statement for Unoffered Lands.

I,, of, being, have since the first day of, A. D. 18..., settled and improved the quarter of section No. ..., in township No. ..., of range No. ..., in the district of lands subject to sale at the land office at, and containing acres, which land had been rendered subject to private entry prior to my settlement thereon; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under section 2259 of the revised statutes of the United States.

Given under my hand this day of, A. D. 18...

In presence of

Affidavit Required of Pre-emption Claimant.

I,, claiming the right of pre-emption, under section 2259 of the revised statutes of the United States, to the of section No. ..., of township No. ..., of range No. ..., subject to sale at, do solemnly that I have never had the benefit of any right of pre-emption under said section; that I am not the owner of 320 acres of land in any state or territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself.

.....

I,, of the land office at, do hereby certify that the above affidavit was subscribed and sworn to before me this day of, A. D. 18..

Pre-emption Proof.—Testimony of Claimant.

....., being called upon as a witness in own behalf in support of pre-emption claim to the, testifies as follows:

Q. 1. What is your name? (Be careful to give it in full, correctly spelled, in order that it may be here written exactly as you wish it written in the patent which you desire to obtain.)

A.

Q. 2. What is your age?

A.

Q. 3. Are you the head of a family, or a single person? And, if the head of a family, of whom does your family consist?

A.

Q. 4. Are you a native-born citizen of the United States? If not, have you declared your intention to become a citizen, and have you obtained a certificate of naturalization? *

A.

* In case the party has been naturalized, or has only declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

Q. 5. Is the land embraced in your pre-emption claim, above described, included within the limits of an incorporated town? or has it been selected as the site of a city or town, and actually settled and occupied for purposes of trade and business?

A.

Q. 6. Are there any indications of coal, salines, or minerals of any kind on this land? (If so, state what they are, and whether the springs or mineral deposits are valuable.)

A.

Q. 7. Is the land more valuable for agricultural than mineral purposes?

A.

Q. 8. What is your post-office address?

A.

Q. 9. Are you the owner of 320 acres of land in any state or territory?

A.

Q. 10. Have you left or abandoned a residence on land of your own in this to reside upon the land above described?

A.

Q. 11. Have you ever filed a pre-emption declaratory statement for other land than that above described? (If so, give as nearly as you can the date thereof, and description of the land.)

A.

Q. 12. Have you heretofore made a pre-emption entry?

A.

Q. 13. Have you settled upon and improved the land for which you now apply, to sell the same on speculation?

A.

Q. 14. Have you given any mortgage on this land, and have you made any agreement to sell the same?

A.

Q. 15. When did you make settlement on the land, and what constituted your first act of settlement?

A.

Q. 16. What improvements, if any, were on the land at date of your settlement? (If any, state who owned them, and whether they now belong to you.)

A.

Q. 17. What improvements have you made on this land subject to your first act of settlement? (Describe them, and state the total value of the improvements owned by you thereon.)

A.

Q. 18. When did you first establish your residence upon the land?

A.

Q. 19. Have you resided upon the land ever since?

A.

Q. 20. What use have you made of the land?

A.

Q. 21. How much of the land, if any, has been broken and cultivated since your settlement?

A.

I hereby certify that each question and answer in the foregoing testimony was read to the claimant before, and signed name thereto, and that same was subscribed and sworn to before me this day of, 18..

.....,

.....

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose the government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

TITLE LXX.—CRIMES.—CH. 4.

“Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, he is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.” (See sec. 1750.)

(The testimony of two witnesses, in this form, taken separately, required in each case.)

Pre-emption Proof.—Testimony of Witness.

....., being called as a witness in support of the pre-emption claim of to the, testifies as follows:

Q. 1. What is your post-office address?

A.

Q. 2. What is your occupation?

A.

Q. 3. Are you well acquainted with, the claimant in this case? and how long have you known

A.

Q. 4. How old do you know or believe claimant to be?

A.

Q. 5. Is claimant the head of a family or a single person? And if the head of a family, of whom does the family consist?

A.

Q. 6. Is claimant a native-born citizen of the United States? (If not, state, if you can, what steps has taken to become naturalized.)

A.

Q. 7. Are you acquainted with the land above described?

A.

Q. 8. Do you live in the vicinity of the land?

A.

Q. 9. Is this land within the limits of an incorporated town? or has it been selected as the site of a city or town, and actually settled and occupied for purposes of trade and business?

A.

Q. 10. Are there any indications of coal, salines, or minerals of any kind on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

A.

Q. 11. Is the land more valuable for agricultural than mineral purposes?

A.

Q. 12. Is the claimant the owner of 320 acres of land in any state or territory? (State your knowledge in this regard.)

A.

Q. 13. Has the claimant left or abandoned a residence on land of own in this to reside upon the land described? (State your knowledge in this regard.)

A.

Q. 14. Has the claimant ever filed a pre-emption declaratory statement for other land than that above described? or has heretofore made a pre-emption entry? (State your knowledge in this regard.)

A.

Q. 15. Do you know whether the claimant has ever given any

mortgage on this land, or made any agreement to sell the same?
(State your knowledge in this regard.)

A.

Q. 16. When did claimant first make settlement on the land?
and what constituted his first act of settlement?

A.

Q. 17. What improvements does the claimant possess on the
land? and what is the value of the same?

A.

Q. 18. When did claimant first establish a residence upon the
land?

A.

Q. 19. Has claimant resided upon the land continuously ever
since?

A.

Q. 20. For what purpose has the land been used by claimant?

A.

Q. 21. How much of the said land, if any, has been broken
and cultivated since the claimant made settlement thereon?

A.

Q. 22. Is it your belief that has acted in good
faith in the settlement and improvement of the said land under
the pre-emption laws? Have you any knowledge to the con-
trary?

A.

Q. 23. Are you interested in this claim?

A.

I hereby certify that witness is a person of respectability, that
each question and answer in the foregoing testimony was read
to before signed name thereto, and that
the same was subscribed and sworn to before me this day
of, 18..

Receiver's Final Receipt No. Application No.

HOMESTEAD.

Receiver's Office, (Date), 18..

Received from, of county,, the
sum of dollars and cents, being the balance of
payment required by law for the entry of the of section

..., in township ..., of range ..., containing acres, under section of the Revised Statutes of the United States.

\$, Receiver.

Final Certificate No. Application No.

HOMESTEAD.

It is hereby certified, pursuant to section 2291, Revised Statutes of the United States, that, of, has made payment in full for of section No. ..., in township No. ..., of range No. ..., containing acres.

Now, therefore, be it known, that on presentation of this certificate to the commissioner of the general land office, the said shall be entitled to a patent for the tract of land above described., Register.

(To be used in cases of commuted homestead entries. For taking the testimony of claimant and his witnesses in making commutation proof, use the prescribed forms for "Homestead Proof.")

Commuted Homestead.—Affidavit.

(Revised Statutes, sec. 2301.)

I,, claiming the right to commute, under section 2301 of the Revised Statutes of the United States, my homestead entry No., made upon the section .., township ..., range ..., do solemnly swear that I made settlement upon the said land on the day of, 18.., and that since such date, to wit, on the day of, 18.., I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated acres of said land; that none of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

.....,
Land Office,

Subscribed and sworn to before me this day of, 18.., , Register.

Adjoining-Farm Homestead.—Affidavit.

Land Office at, (Date), 18..

I,, of, having filed my application No., for an entry under the provisions of the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear that [here state whether the applicant is the head of a family or over twenty-one years of age; whether a citizen of the United States, or has filed his declaration of intention of becoming such, or if under twenty-one years of age, that he has served not less than fourteen days in the army or navy of the United States during actual war]; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; neither have I heretofore perfected or abandoned an entry made under this act; that the land embraced on said application No. is intended for an adjoining-farm homestead; that I now own and reside upon an original farm containing acres, and no more; that the same comprises the of section .., township .., range .., and is contiguous to the tract this day applied for.

Sworn to and subscribed this day of before

.....,

..... of the Land Office.

Final Affidavit Required of Adjoining-Farm Homestead Claimants.

(Revised Statutes, sec. 2291.)

I,, having made a homestead entry of the section No. .., in township No. .., of range No. .., subject to entry at, for the use of an adjoining farm owned and occupied by me on the of section No. .., in township No. .., of range No. .., under section 2289 of the Revised Statutes, do now apply to perfect my claim thereto by virtue of section 2291 of the same, and for that purpose do solemnly that I am a citizen of the United States; that I have continued to own and occupy the land constituting my original farm, having resided thereon since the day of, 18.., to the present time, and have made use of the said entered tract as a part of my homestead, and have improved the

same in the following manner, viz.: That no part of said land has been alienated, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the government of the United States; and, further, that I have not heretofore perfected or abandoned an entry under the homestead laws.

I,, of the land office at, do hereby certify that the above affidavit was taken and subscribed before me this day of, 18 ..

(To be used in making final proof in cases where pre-emption filings have been changed to homestead entries under the acts of March 3, 1877, and May 27, 1878.)

Pre-emption Homestead.—Affidavit.

I,, having changed my pre-emption declaratory statement No., filed the day 18..., alleging settlement the day of, 18..., for the section No. ..., in township, No. ..., of range No. ..., to homestead entry original No., district of lands subject to entry at, under the acts of congress approved March 3, 1877, and May 27, 1878, do solemnly swear that I have never had the benefit of any right of pre-emption under section 2259 of the Revised Statutes of the United States; that I have not heretofore filed a pre-emption declaratory statement for another tract of land; that I was not the owner of 320 acres of land in any state or territory of the United States at any time during the above-mentioned period of settlement under the pre-emption statutes; that I did not remove from my own land within the state of to make the settlement above referred to; nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my exclusive use or benefit; and that I did not, during the period of pre-emption settlement above mentioned, directly or indirectly, make any agreement or contract in any way or manner, with any person or persons whatsoever by which the title which I might acquire from the government of the United States would inure, in whole or in part, to the benefit of any person except myself.

472 PUBLIC LAND SYSTEM OF THE UNITED STATES.

I,, of the land office at, do hereby certify that the above affidavit was subscribed and sworn to before me this day of, 18...

.....

Additional Homestead.

Application No.

(Act of March 3, 1879.)

Land Office at, (Date), 18..

I,, of, do hereby apply to enter under the act of March 3, 1879, the of section .., in township .., of range .., containing acres, as additional to my entry No. for the of section .., in township .., of range ..

.....

Land Office at, (Date), 18..

I, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the act of March 3, 1879, and that there is no prior valid adverse right to the same.

....., Register.

Additional Homestead.—Affidavit.

(Act of March 3, 1879.)

Land Office at, (Date), 18..

I,, of having filed my application No., for an entry under the act of March 3, 1879, do solemnly swear that [here state whether the applicant is the head of a family, or over twenty-one years of age; whether a citizen of the United States, or has filed his declaration of intention of becoming such; or, if under twenty-one years of age, that he has served not less than fourteen days in the army or navy of the United States during actual war]; that said application No. is made for my exclusive benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any person or persons whomsoever, and that I have not heretofore had the benefit of said act.

.....

Sworn to and subscribed this day of, before
, Register [or Receiver].

Soldier's Homestead.—Homestead Declaration.

(Revised Statutes, sec. 2304.)

No. Land Office at, (Date), 18...

I,, do hereby declare and give notice that I claim for a homestead, under section 2304 of the Revised Statutes of the United States, granting homesteads to honorably discharged soldiers and sailors, their widows and orphans, the of section .., of township .., of range .., containing acres; and I further declare that I take the said tract of land for actual settlement and cultivation, and for my own use and benefit.

Per, his attorney in fact.

Soldier's Homestead.—Application.

(Revised Statutes, sec. 2304.)

Land Office at, (Date), 18...

I,, hereby apply to enter, under section 2304 of the Revised Statutes of the United States, the of section .., of township .., of range .., containing acres; and for which I filed my declaration on the day of, through, my duly appointed agent.

I, register of the land office at, do hereby certify that filed the above application at this office on the day of, and that he has taken the oath and paid the fees and commissions prescribed by law.
, Register.

Soldier's Homestead.—Affidavit.

(Revised Statutes, sec. 2304.)

No. Land Office at, (Date), 18...

I, of, do solemnly swear that I am a of the age of twenty-one years and a citizen of the United States; that I served for ninety days in company, regiment, United States volunteers, that I was mus-

tered into the United States military service the day of, and was honorably discharged therefrom on the day of; that I have since borne true allegiance to the government; and that I have made my application, No., to enter a tract of land under section 2304 of the Revised Statutes of the United States, giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children; that I have made said application in good faith, and that I take said homestead for the purpose of actual settlement and cultivation, and for my own exclusive use and benefit, and for the use and benefit of no other person or persons whomsoever; and that I have not heretofore acquired a title to a tract of land under the homestead laws, nor voluntarily relinquished or abandoned an entry heretofore made under said laws; so help me God.

.....
Sworn to and subscribed before me, register of
the land office at this day of 18..
....., Register.

Soldier's Additional Homestead Entry.—Application.

(Revised Statutes, sec. 2306.)

No. Land Office at, (Date), 18..

I,, of county, state of, being entitled to the benefits of section 2306 of the Revised Statutes of the United States, granting additional lands to soldiers and sailors who served in the war of the rebellion, do hereby apply to enter the of section .., of township .., of range .., containing acres, as additional to my original homestead on the of section .., of township .., of range .., containing acres, which I entered, 18.., per homestead No.

.....
Land Office at, (Date), 18..

I,, register of the land office at, do hereby certify that filed the above application before me for the tract of land therein described, and that he has paid the fee and commissions prescribed by law.

....., Register.

Soldier's Additional Homestead Entry.

(Revised Statutes, sec. 2306.)

Final certificate No. Application No.

Land Office at, (Date), 18..

It is hereby certified that, pursuant to the provisions of section 2306 of the Revised Statutes of the United States,
has paid the fee and commissions, and made entry of the of section .., of township .., of range .., containing acres, which added to the quantity embraced in his original homestead No., on which he made his final proof, as per certificate No., does not exceed one hundred and sixty acres.

Now, therefore, be it known that on presentation of this certificate to the commissioner of the general land office, the said shall be entitled to a patent for the tract of land above described.

....., Register.

Indian Homestead—Affidavit.

(Act of March 3, 1875.)

I,, of, having filed my application No., for an entry under the provisions of the act of congress of March 3, 1875, do solemnly swear that I am an Indian, formerly of the tribe; that I was born in the United States; that I have abandoned my relations with that tribe and adopted the habits and pursuits of civilized life [here state whether the applicant is twenty-one years of age, or the head of a family]; that I desire said land for the purpose of actual settlement and cultivation, and not, directly or indirectly, for the use or benefit of any person or persons whomsoever; and that I have not heretofore had the benefit of said act.

Sworn to and subscribed before me this day of, 18..

....., Register [or Receiver].

Corroborative Affidavit—Indian Homestead.

(Act of March 3, 1875.)

..... and do solemnly swear that we are well acquainted with, and know that he is an Indian, formerly of the tribe; that he was born in the United States; [that he has abandoned his relations with that tribe, and adopted the habits and pursuits of civilized life [here state that he is twenty-one years of age, or if not, that he is the head of a family].

Sworn to and subscribed before me this day of, 18..

Timber Culture.—Application No.

(Act of June 14, 1878.)

I,, hereby apply to enter, under the provisions of the act of June 14, 1878, entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the western prairies,'" the of section .., in township .., of range .., containing acres.

Land Office at, (Date), 18...

I,, register of the land office, do hereby certify that the above application is for the class of lands which the applicant is legally entitled to enter under the provisions of the timber-culture act of June 14, 1878; that there is no prior valid adverse right to the same; and that the land therein described, together with the lands heretofore entered under this act, and the acts of which this is amendatory, in the said section, does not exceed one quarter thereof.

....., Register.

Timber Culture.—Affidavit.

(Act of June 14, 1878.)

Land Office at (Date), 18 ..

I,, having filed my application No. for an entry under the provisions of an act entitled "An act to amend

an act entitled 'An act to encourage the growth of timber on the western prairies,' approved June 14, 1878, do solemnly that I am the head of a family (or over twenty-one years of age), and a citizen of the United States (or have declared my intention to become such); that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber; that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act; and that I have not heretofore made an entry under this act, or the acts of which this is amendatory.

Sworn to and subscribed before me this day of,
18..

Timber Culture.

Receiver's Receipt No. Application No.

Receiver's Office, (Date), 18..

Received of the sum of dollars and cents, being the amount of fee and compensation of register and receiver for the entry of of section .., in township .., of range .., under the first section of the act of congress approved June 14, 1878, entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the western prairies.'"

\$, Receiver.

Desert Land.—Declaration.

(Act of March 3, 1877.)

No..... Land Office at....., (Date), 18..

I,, of county, of, being duly sworn, depose and declare, that I am a citizen of the United States, of the age of, and a resident of said county and

....., and by occupation a; that I intend to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same, within three years from date, under the provisions of the act of congress approved March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories." The desert land which I intend to reclaim does not exceed one section, and is situated in..... county, in the land district, and is described as follows, to wit: the of section No. ..., township No. ..., range No. ..., containing acres. I further depose, that I have made no other declaration for desert lands under the provisions of said act; that the land above described will not, without irrigation, produce an agricultural crop; that there is no timber growing upon said land; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to my knowledge, any placer, cement, gravel, or other valuable mineral deposit or salines; that no portion of said land is claimed for mining purposes, under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land; that I became acquainted with said land by; and that my declaration therefor is not made for the purpose of fraudulently obtaining title to mineral land, timber land, or agricultural land, but for the purpose of faithfully reclaiming, within three years from the date hereof, by conducting water thereon, a tract of land which is desert land within the meaning of the act.

.....
Land office at....., (Date), 18..

I hereby certify that the foregoing declaration was this day sworn to and subscribed before me.

....., Register.

....., Receiver.

Desert Land.—Affidavit.

(Act of March 3, 1877.)

No. Land Office at, (Date), 18..

I,, of county,, being duly sworn, declare upon oath that I am a resident of said county and

that I am of the age of, and by occupation a; that I am well acquainted with the character of each and every legal subdivision of the following-described land: The section No. . . , township No. . . , range No. . . , containing acres; that I became acquainted with said land by; that I have been acquainted with it for years last past; that I have frequently passed over it; that my knowledge of said land is such as to enable me to testify understandingly concerning it; that the same is desert land within the meaning of the second section of the act of congress approved March 3, 1877, entitled "An act to provide for the sale of desert land in certain states and territories;" that said land will not, without artificial irrigation, produce any agricultural crop; that no agricultural crop has ever been raised or cultivated on said land, for the reason that it does not contain sufficient moisture for successful cultivation; that the same is essentially dry and arid land, wholly unfit for cultivation without artificial irrigation; that said land can not be successfully cultivated without reclamation by conducting water thereon; that said land has hitherto been unappropriated, unoccupied, and unsettled, because it has been impossible to cultivate it successfully on account of its dry and arid condition; that it is a fact well known, patent, and notorious, that the same will not, in its natural condition, produce any crop; that the land is the; that there is no timber growing thereon, but that it is devoid of timber; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not, within the limits of said land, to my knowledge, any placer, cement, gravel, or other valuable mineral deposit or salines; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land; that I am not interested in any way or manner, directly or indirectly, present or prospective, in any application or declaration made or to be made for said land, or in the land itself, or in the title which may, by any person or in any manner, be acquired thereto.

.....

Desert Land.—Certificate.

No. United States Land Office,, 18 ..

It is hereby certified that under the provisions of the act of congress approved March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories," has this day filed in this office his declaration of intention to reclaim the following-described tract of land, viz. :; that he has proven to our satisfaction that the said tract of land is desert land, as defined in the second section of said act, and that he has paid to the receiver the sum of dollars, being at the rate of twenty-five cents per acre for the land above described. It is, therefore, further certified, that if within three years from the date hereof the said, his heirs or legal representatives, shall satisfactorily prove that the said land has been reclaimed by carrying water thereon, and shall pay to the receiver the additional sum of one dollar per acre for the land above described, he or they shall be entitled to receive a patent therefor under the provisions of the said act.

\$.....

....., Register.

....., Receiver.

NOTE.—The word "heirs" is substituted in this form for the word "assignee," the secretary of the interior having declined to recognize the assignment of desert land claims.

Final Proof.—Deposition of Applicant.

(Desert Land Act of March 3, 1877.)

Q. 1. State your name, age, occupation, and residence.

A.

Q. 2. Are you a citizen of the United States? Or, if not, have you declared your intention to become such? (If not native-born, record proof must be furnished.)

A.

Q. 3. If you have heretofore made a desert land entry, give the number and date thereof, and describe the land embraced therein.

A.

Q. 4. Have you conducted water upon the land embraced in said entry, and irrigated the same, and reclaimed it from its

former desert character, to such an extent that it will now produce an agricultural crop?

A.

Q. 5. What crops have you raised upon said land in each and every year since your first entry thereon under your declaration No?

A.

Q. 6. How many acres have been sown or planted in each year, in what crops, and upon what portion or subdivision of the land, and what amount of such crop has been actually produced?

A.

Q. 7. What crops, if any, had been grown upon the land, or upon any portion thereof, and, if any, upon what portion, previous to your entry thereon?

A.

Q. 8. Would the land, or any portion of it, by cultivation without irrigation, have produced any agricultural crop whatever? And if so, what crop?

A.

Q. 9. Was there any natural water supply upon such land sufficient to fertilize or irrigate the whole or any portion thereof? If so, what portion? State fully.

A.

Q. 10. Has the amount of water conveyed upon the land in any one season been sufficient to so irrigate the entire tract as to render the same productive? And if so, what crop or crops would such irrigation produce?

A.

Q. 11. Has the whole tract been irrigated and cultivated by you in any one season?

A.

Q. 12. Has each smallest legal subdivision or portion of less than forty acres been irrigated or cultivated either during one season or different seasons since the date of your entry?

A.

Q. 13. How much water per acre has been conducted upon the land, or upon any portion under cultivation, in any one season? For how long a time was it so conducted upon the land? and at what times or seasons? State fully.

A.

Q. 14. In what manner was such water conveyed upon the land, whether by pipes or ditches? and how was it distributed

over and through the soil? State particularly and in detail, and describe the ditches as to their width, depth, direction through or around the land, and give the length of each.

A.

Q. 15. Have you at this time the right and proprietorship of water sufficient and available to continue the irrigation of this tract and make perpetual reclamation of the land? and is it your purpose so to continue its use upon this land, and for the purposes of such reclamation?

A.

Q. 16. How was such right or proprietorship obtained? and by what tenure do you now hold the same? (Duly verified abstract of title must be furnished.)

A.

Q. 17. Have you the sole and entire interest in said entry, and in the tract covered thereby, and the water appropriated to irrigate the same?

A.

Q. 18. Has any other person, individual, or company of individuals any interest whatever in said entry, tract, or water appropriation? If so, give the name, residence, and occupation of each such person, and the nature, amount, and extent of such interest.

A.

Q. 19. Have you made or become the assignee of any other entry? or have you any interest, direct or indirect, in any other entry under the desert-land act?

A.

(Signature)

I hereby certify that each question and answer in the foregoing deposition was read to the applicant before signed name thereto, and that the same was subscribed and sworn to before me this.....day of 18..

....., Register.

....., Receiver.

NOTE.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

TITLE LXX.—CRIMES.—CH. 4.

“Sec. 5392.—Every person who, having taken an oath before a competent tribunal, officer, or person, in any case which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or cer-

tificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by punishment at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States, until such time as the judgment against him is reversed." (See sec. 1750.)

(The deposition of two witnesses, in this form, taken separately, required in each case).

Final Proof.—Deposition of Witness.

(Desert Land Act of March 3, 1877.)

Q. 1. State your name, age, residence, and occupation.

A.

Q. 2. Are you acquainted with, who made desert-land entry No. on the day of, A. D. 18.., upon the?

A.

Q. 3. How long have you known the party who made this entry?

A.

Q. 4. Have you personal knowledge of this land?

A.

Q. 5. Has water been conducted upon the land embraced in said entry so as to irrigate and reclaim the same from its former desert condition, to such extent that the same will produce an agricultural crop?

A.

Q. 6. What crops have been raised upon said land in each and every year since its first entry by under declaration No., and by whom?

A.

Q. 7. How many acres have been sown or planted in each year, in what crops, and upon what portion or subdivision of the land? and what amount of crops have been produced thereon, and by whom?

A.

Q. 8. What crops, if any, had been grown upon the land, or upon any portion thereof, previous to the entry of thereon?

A.

Q. 9. Would the land, or any portion of it, by cultivation without irrigation, have produced any agricultural crop whatever? And if so, what crop?

A.

Q. 10. Was there any natural water supply upon such land sufficient to fertilize or irrigate the whole, or any portion thereof? And if so, what portion? State fully.

A.

Q. 11. Has the amount of water conveyed upon said land by in any one season been sufficient to so irrigate the entire tract as to render the same productive? And if so, what crop or crops would such irrigation produce?

A.

Q. 12. Has the whole tract been irrigated and cultivated by in any one season?

A.

Q. 13. Has each smallest legal subdivision or portion of less than forty acres been irrigated or cultivated either during one season or different seasons since the date of entry?

A.

Q. 14. How much water per acre has been conducted upon the land, or upon any portion under cultivation, in any one season? For how long a time was it so conducted upon the land? and at what times or seasons? State fully.

A.

Q. 15. In what manner was such water conveyed upon the land, whether by pipes or ditches? and how was it distributed over and through the soil? State particularly and in detail, and describe the ditches, as to their width, depth, direction through or around the tract, and give the length of each.

A.

Q. 16. Has at this time the right and proprietorship of water sufficient and available to continue the irrigation of this tract, and make perpetual reclamation of the land?

A.

Q. 17. How did you become acquainted with the facts relative to the irrigation of said land?

A.

Q. 18. Have you any interest, direct or indirect, in this entry, in the land covered thereby, or in the water supply used in its irrigation?

A.

(Signature)

I hereby certify that witness is a person of respectability, that each question and answer in the foregoing testimony was read to before signed, name thereto, and that the same was subscribed and sworn to before me this day of, 18..

....., Register.

....., Receiver.

NOTE.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

“TITLE LXX.—CRIMES.—CHAP. 4.

“Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by punishment at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States, until such time as the judgment against him is reversed.” (See sec. 1750.)

Desert [Land.

(Act of March 3, 1877.)

Receiver's Final Receipt No. Declaration No.
Land Office at, (Date), 18..

Received from, of county,, the sum of dollars and cents, being final payment of one dollar per acre for the containing acres, at one dollars and twenty-five cents per acre, the sum of twenty-five cents per acre having been heretofore paid, as per original receipt No.

\$.....

....., Receiver.

Desert Land.

(Act of March 3, 1877.)

Register's Final Certificate No. Declaration No.
Land Office at, (Date), 18..

It is hereby certified that, in pursuance of the act of con-

gress approved March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories," of county, state [or territory] of, has purchased of the register of this office, and made payment in full for the land described as follows, to wit: containing acres, at the rate of one dollar and twenty-five cents per acre, amounting to dollars.

Now, therefore, be it known, that on presentation of this certificate to the commissioner of the general land office, the said shall be entitled to receive a patent for the tract of land above described.

....., Register.

NOTE.—See original declaration and receipt No.

Timber and Stone Lands—Sworn Statement.

(Act of June 3, 1878.)

Land Office at, (Date), 18..

I,, of county,, desiring to avail myself of the provisions of the act of congress of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," for the purchase of the of section .., township .., of range .., do solemnly that I*; that the said land is unfit for cultivation, and valuable chiefly for its; that it is uninhabited; that it contains no mining or other improvements,, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the government of the United States may inure, in whole or in part, to the benefit of any person except myself.

* In case the party has been naturalized, or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

Sworn to and subscribed before me this day of,
 18..

(The testimony of two witnesses, in this form, taken separately, required in each case.)

Timber and Stone Lands.—Testimony of Witness.

(Act of June 3, 1878.)

....., being called as a witness in support of the application of to purchase of section ..., township ..., of range ..., testifies as follows:

Q. 1. What is your post-office address? and where do you reside?

A.

Q. 2. What is your occupation?

A.

Q. 3. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

A.

Q. 4. When and in what manner was such inspection made?

A.

Q. 5. Is it occupied? or are there any improvements on it not made for ditch or canal purposes, or which were not made by, or do not belong to the said applicant?

A.

Q. 6. Is it fit for cultivation?

A.

Q. 7. What causes render it unfit for cultivation?

A.

Q. 8. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal, on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

A.

Q. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon? or is it chiefly valuable for timber or stone?

A.

Q. 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

A.

Q. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or man-

ner, with any person whomsoever, by which the title he may acquire from the government of the United States may inure, in whole or in part, to the benefit of any person except himself?

A.

Q. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon?

A.

I hereby certify that witness is a person of respectability, that each question and answer of the foregoing testimony was read to before signed name thereto, and that the same was subscribed and sworn to before me this day of, 18...

.....

.....

FORMS

IN APPLICATION FOR MINERAL LANDS.

FORM 1.

Notice of Location for Lode or Vein Claims.

Notice is hereby given, that the undersigned, having complied with the requirements of chapter 6 of title 32 of the Revised Statutes of the United States, and the local customs, laws, and regulations, has [or have, as the case may be] located linear feet on this mineral lode or vein, situated in mining district, county,, and described as follows: [The claim should be accurately described by courses and distances, if possible with reference to some natural object or permanent monument, or the lines of government survey, and the exterior boundaries of the claim should be marked before recordation of notice with suitable monuments, either of stone or other material.] , Locator.

Dated

Witnesses:

.....

The records of location notices, in the absence of a district recorder, should be made with the proper recorder of deeds for the county wherein the claim is situated. It is advisable to have these notices attested by witnesses, for locators can not be too careful about their evidence.

In relocations, to increase width of surface grounds under the local law, or to more particularly identify or describe the claim, use the above form, but state after the description that it is a relocation, and in addition where the original location is recorded, in order that the title may revert back to the original discovery.

In locations of abandoned mines, the fact that it is such a location should be stated, and the affidavits of two or more respectable parties that such mine was abandoned and subject to relocation should be recorded with the location notice.

Where the location is by agent, that fact should be stated

after the name of the locator, thus: By Thomas Jones, agent (or attorney).

See also Mining Claims before Land Offices.

FORM 2.

Notice of Location of a Placer Claim.

Notice is hereby given to all whom it may concern, that
, citizen of the United States, over the age of
 twenty-one years, have this day located, under the Revised
 Statutes of the United States, c. 6, tit. 32, the following-de-
 scribed placer-mining ground, viz.:* situated in
 mining district, county, state of This claim
 shall be known as the placer-mining claim, and we in-
 tend to work the same in accordance with the local customs and
 rules of miners in said mining district.

.....

 Dated on the ground, this day of, 18..

FORM 3.

**Application to United States Surveyor General for
 Survey of Mining Claim.**

....., United States Surveyor General for
Sir: In compliance with the provisions of the Revised Statutes
 of the United States, c. 6, tit. 32, and instructions issued
 thereunder, herewith make application for an official
 survey of the mining claim known as the mine, claimed by
, located in mining district, in the county
 of, township No. ..., range No. ..., base and me-
 ridian, in the state of, mentioned and described in the
 annexed record of location; and request that you will
 send to address an estimate of the amount to be de-
 posited for the work to be done in your office; and after such
 deposit shall have been made, you will cause the said mining
 claim to be surveyed by United States deputy
 mineral surveyor, and will make a plat thereof, indorsed with
 your approval, designating the number and description of the

* If on surveyed land, describe the legal subdivisions; if on unsurveyed
 land, describe as accurately as possible, by course and distance.

location, and the value of the labor and improvements made by the locator or his grantees on said mining claim; and that you will transmit duplicate copies of said plat to applicant
, with a certified copy of the field-notes of survey of said mining claim.

The expenses of office work herewith tendered, and request that prompt action be taken therein.

....., Claimant.

P. O. Address,,

..... County,

.....

NOTE.—If the applicant is not in actual possession of the ground, an affidavit stating how he was dispossessed, when he was last in possession, and what adverse claims there are, should be filed. This affidavit should state all the material facts and circumstances.

FORM 4.

Estimate of United States Surveyor General for Office Work for Mining Claim.

U. S. Surveyor General's Office,

. San Francisco,, 18..

.....,, county, California.

.....:, I have received your application, dated, 18.., made under the provisions of chapter 6, Revised Statutes of the United States, for a survey of the mining claim known as the mine, claimed by, located in mining district, in the county of, township No. ..., range No. ..., base and meridian, in the state of California; also for an estimate of the expense of the office work required to be done in this office. In reply, I herewith furnish an estimate of the amount to be paid for such office work, viz.:

Stationery.....	\$.....
Examination of the original field-notes.....
Protraction of the original plat.....
Making duplicate and triplicate plats for claimants..
Transcription of the original field-notes for claimant.
Preparing diagrams for general and local land offices..

Total..... \$.....

The said amount must be deposited with the United States assistant treasurer in San Francisco, and his certificate, in tri-

plicate, taken therefor, and sent to this office; one to be transmitted to commissioner of the general land office, and one to the treasurer of the United States, and the other to be forwarded to you.

Upon the filing of said certificate, in duplicate, in this office, I will at once authorize the survey of said mining claim by a United States deputy mineral surveyor. After the survey and office work have been completed I will transmit to your address two certified plats of said mining claim and a certified transcript of the field-notes for your use.

Very respectfully,

.....
U. S. Surveyor General for California.

FORM 5.

U. S. Surveyor General's Office,, 18..
....., Esq., U. S. Deputy Mineral Surveyor,,
..... county.

Sir: Having received an application from, under the provisions of an act of congress approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States," for a survey of the mining claim, known as the mine, claimed by, in the mining district, county of, township No. ..., range No. ..., base and meridian, in the state of, I hereby depute and appoint you to execute the said survey.

You will make said survey so as to define correctly the *locus* of the ground described in the annexed record of location, and according to the monuments therein referred to.

You will make your survey in strict conformity to the law and special instructions to deputy mineral surveyors from this office.

You will make full report in all matters connected therewith, the value of the improvements, work, and labor done on said claim, in the currency of the United States, the character of the vein exposed, and its connection with some established monuments of public surveys.

You will transmit to this office, without unnecessary delay, your field-notes of survey, your final oath, the preliminary and final oaths of our assistants, your report, a diagram of said mine, and the affidavits of two disinterested witnesses that to the best of their knowledge and belief, from their acquaintance with

said mine, the value of the labor and improvements thereon is not less than five hundred dollars.

The United States will not be responsible for the payment of your services; you will therefore make satisfactory arrangements with the claimant before proceeding with your survey.

Very respectfully,

.....,
U. S. Surveyor General for

It is sometimes necessary to use the following:

FORM 6.

Certificate of Identity of Claim.

Territory of Utah,, County of

..... and, of lawful age, each for himself and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, that he is well acquainted with the mining claim situated in mining district, county and territory aforesaid, for which made application for patent under the provisions of an act of congress, approved May 10, 1872; that he is not interested in the aforesaid mining claim, either directly or indirectly; that he was present on the day of, A. D. 18.., on the ground of said mining claim; and that the survey of said mining claim, made on that day by, surveyor, embraces the identical ground originally claimed by its locators; and further, that the initial point of discovery of said lode or mining claim, from which said survey has been made by the said surveyor, is the same place where the notice of said lode or mining claim originally was posted.

.....
.....
Subscribed and sworn to before me this day of,
A. D. 18.., and I hereby certify that I consider the above deponents credible and reliable witness.

.....

FORM 7.

Application for Patent.*

....., of, county of, ss.

Application for patent for the mining claim.

To the register and receiver of the United States land office
at

....., being duly sworn according to law, deposes and says, that in virtue of a compliance with the mining rules, regulations, and customs by himself, the said and his co-claimants, applicants for patent herein, ha.. become the owner.. of and in actual, quiet, and undisturbed possession of linear feet of the vein, lode, or deposit, bearing, together with surface ground feet in width, for the convenient working thereof, as allowed by local rules and customs of miners; said mineral claim, vein, lode, or deposit, and surface ground being situated in the mining district, county of, and of, and being more particularly set forth and described in the official field-notes of survey thereof, hereto attached, dated day of, A. D. 18.., and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself (and his said co-claimants hereinbefore named) to said mining claim, vein, lode, or deposit and surface ground, so surveyed and platted, are substantially as follows, to wit [Give full description of claim, from whom and the manner in which title was derived]; which will more fully appear by reference to the copy of the original record of location, heretofore furnished, and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and the improvements made upon said claim, by himself and his grantors, being equal to the sum of \$500, and said improvements consist of [describe in detail]. In consideration of which facts, and in conformity with the provisions of chapter 6 of title 32 of the Revised Statutes of the United States, application is hereby made for and in behalf of said, for a patent from the government of the United States for the said mining claim, vein, lode, deposit, and the surface ground so officially surveyed and platted.

* This form is not proper in every case; it must be varied to suit circumstances.

Subscribed and sworn to before me this day of,
 A. D. 18.., and I hereby certify that I consider the above de-
 ponent a credible and reliable person, and that the foregoing
 affidavit, to which were attached the field-notes of survey of the
 mining claim, was read and examined by him before his
 signature was affixed thereto and the oath made by him.

..... [Seal.]

..... [Seal.]

NOTE.—The above is slightly changed in applying to placer mines. Under the provisions of section 1 of the act of congress of January 22, 1880, this application may be made by an agent, when the claimant for patent is not a resident of or within the land district.

The applicant should immediately cause to be posted, in a conspicuous place upon the mining claim, the following notice:

FORM 8.

Notice of Applicant for a United States Patent.

Notice is hereby given that in pursuance of the act of congress approved May 10, 1872, "To promote the development of the mining resources of the United States,"
 and, claiming linear feet of the,
 vein, lode, or mineral deposit, bearing, with surface
 ground feet in width, lying, being, and situate within
 the mining district, county of, and of
, has made application to the United States for a patent
 for the said mining claim, which is more fully described as to
 metes and bounds by the official plat herewith posted, and by
 field-notes of survey thereof now filed in the office of the reg-
 ister of the district of lands, subject to sale at, which
 field-notes of survey described the boundaries and extent of
 said claim on the surface, with magnetic variation at
 east, as follows, to wit: The said mining claim being
 of record in the office of the recorder of at, in
 the county and aforesaid, the presumed general course
 or direction of the said vein, lode, or mineral deposit,
 being shown upon the plat posted herewith, as near as can be
 determined from present developments, this claim being for
 linear feet thereof, together with the surface ground
 shown from the official plat posted herewith, the said vein,
 lode, and mining premises hereby sought to be patented being

bounded as follows, to wit: The said claim being designated as lot number in the official plat posted herewith. Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed, as according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the United States land office at, in the of, they will be barred in virtue of the provisions of said statute.

.....

Dated on the ground, this day of, 18..
 Witnesses:

.....

FORM 9.

Proof of Posting Notice and Diagram on the Claim.

....., of, county of, ss.

..... and, each for himself and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and was present on the day of, 18 .., when a plat representing the and certified to as correct by the United States surveyor general of, and designated by him as lot No. ..., together with a notice of the intention of and to apply for a patent for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit, upon, where the same could be easily seen and examined; the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

Notice of the application of and for a United States patent. Notice is hereby given that in pursuance of chapter 6 of title 32 of the Revised Statutes of the United States, and claiming linear feet of the vein, lode, or mineral deposit, bearing with surface ground feet in width, lying and being situated within the mining district, county of, and of

....., ha .. made application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted, and by the field-notes of survey thereof now filed in the office of the register of the district of lands subject to sale at, which field-notes of survey describe the boundaries and extent of said claim on the surface with magnetic variation at east, as follows, to wit: The said mining claim being of record in the office of the recorder of at, in the county and aforesaid, the presumed general course or direction of the said vein, lode, or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments, this claim being for linear feet thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode, and mining premises hereby sought to be patented being bounded as follows, to wit: The said claim being designated as lot No. .. in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed, as according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the United States land office at in the of, they will be barred, in virtue of the provisions of said statute.

Dated on the ground, this day of, 18..

Witnesses:

.....
Subscribed and sworn to before me this day of, 18..; and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto and the oath made by them.

.....

.....

NOTE.—The notice to be posted on the claim with the plat is given in the above form.

FORM 10.

Affidavit of Five Hundred Dollars' Improvements.

....., of, county of, ss.

..... and, of lawful age, being duly sworn according to law, depose and say that they are acquainted with the mining claim in mining district, county and aforesaid, for which has made application for patent under the provisions of chapter 6 of title 32, Revised Statutes of the United States, and that the labor done and the improvements made thereon by the applicant and his grantors exceed five hundred dollars in value, and said improvements consist of

Subscribed and sworn to before me, this day of,
A. D. 18..

FORM 11.

Proof of Labor.

....., of, county of, ss.

Before me, the subscriber, personally appeared, who, being duly sworn, says that at least dollars' worth of labor or improvements were performed or made upon, situated in mining district, county, of, during the year ending, 18.. Such expenditure was made by or at the expense of, owners of said claim, for the purpose of holding said claim.

FORM 12.

Affidavit of Citizenship.

....., of, county of, ss.

....., being first duly sworn according to law, deposes and says that he is the applicant for patent for mining claim, situated in mining district, county of; that he is a na..... citizen of the United States, born in

county of, state of, in the year 18.., and is now
a resident of

Subscribed and sworn to before me, this day of
....., A. D. 18..

FORM 13.

Agreement of Publisher.

The undersigned, publisher and proprietor of the, a
..... newspaper published at, county of, and
..... of, do hereby agree to publish a notice, dated
United States land office,, required by the provisions
of chapter 6 of title 32, Revised Statutes of the United
States, the intention of to apply for a patent for
his claim on the lode, situated in mining district,
county of, of, and to hold the said
alone responsible for the amount due for publishing the same.
And it is hereby expressly stipulated and agreed that no claim
shall be made against the government of the United States, or
its officers or agents, for such publication.

Witness my hand and seal this day of, 18..

Witness:

FORM 14.

Notice (from Land Office) of Application for Patent.

United States Land Office, 18..

Notice is hereby given that, whose post-office
address is, has this day filed his application for a patent
for linear feet of the mine or vein bearing,
with surface feet in width, situated in mining
district, county of and of, and designated
by the field-notes and official plat on file in this office as lot
No., in township .., range .., of meridian,
said lot number .. being as follows, to wit:

Beginning

NOTE.—At the expiration of the period of legal publication of notices of
application the claimant should file with the land officers the proofs indicated
by forms 15, 16, 17.

FORM 15.

Proof of Publication.

..... county of, ss.

....., being duly sworn, deposes and says that he is the of the, a newspaper published in, in county, in the; that the notice,, of which a copy is hereto attached, was first published in said newspaper in its issue dated the day of 18.., and was published in each issue of said newspaper for thereafter, the full period of, the last publication thereof being in the issue dated the day of, 18..

Subscribed and sworn to before me, this day of
A. D. 18..

FORM 16.

Proof that Plat and Notice Remained Posted on Claim during Time of Publication.

....., of, county of, ss.

....., being first duly sworn according to law, deposes and says that he is claimant (and co-owner with) in the mining claim, mining district, county,, the official plat of which premises, together with the notice of intention to apply for a patent therefor, was posted thereon on the day of, 18.., as fully set forth and described in the affidavit of and, dated the day of, 18.., which affidavit was duly filed in the office of the register at in this case; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from the day of, 18.., until and including the day of, 18.., including the sixty days' period during which notice of said application for patent was published in the newspaper.

Subscribed and sworn to before me this day of, 18.., and I hereby certify that the foregoing affidavit was read to the said previous to his name being subscribed

thereto, and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

[Seal.]

.....,
Notary Public.

FORM 17.

Statement of Fees and Charges.

....., of, county of, ss.

....., being first duly sworn according to law, deposes and says that he is the applicant for patent for the lode in mining district, county of of, under the provisions of chapter 6 of title 32 of the Revised Statutes of the United States, and that in the prosecution of said application he has paid out the following amounts, viz.: To the credit of the surveyor general's office, dollars; for surveying, dollars; for filing in the local land office, dollars; for publication of notice, dollars; and for the land embraced in his claim, dollars.

Subscribed and sworn to before me this day of,
A. D. 18..

[Seal.]

.....,
Notary Public.

FORM 18.

Register's Certificate of Posting Notice for Sixty Days.

United States Land Office at,, 18..

I hereby certify that the official plat of the lode designated by the surveyor-general as lot No., was filed in this office on the day of, A. D. 18.., and that the attached notice of the intention of to apply for a patent for the mining claim or premises embraced by said plat, and described in the field-notes of survey thereof filed in said application, was posted conspicuously in this office on the day of, A. D. 18.., and remained so posted until the day of, A. D. 18.., being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that

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time, subject to examination, and that no adverse claim thereto has been filed.

.....,
Register. •

FORM 19.

Certificate that No Suit is Pending.

....., of, county of, ss.

I,, clerk of the court in and for county,, do hereby certify that there is now no suit or action of any character pending in said court involving the right of possession to any portion of mining claim, and that there has been no litigation before said court affecting the title to said claim, or any part thereof for years last past, or within the period prescribed by the statute of limitations, to wit, years, other than what has been finally decided in favor of

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in, this day of, A. D. 18..

.....
Clerk of the court.

FORM 20.

Protest and Adverse Claim.

United States Land Office, of

In the matter of the application of for a United States patent for the lode or mining claim, and the land and premises appertaining to said mine, situated in the mining district, in county, of

To the register and receiver of the United States land office at, and to the above-named applicant for patent for the lode:

You are hereby notified, that, of the city of, county of, and of, and a citizen of the United States of America, is the lawful owner and entitled to the possession of hundred feet of the said lode or mine described in said application, as shown by the diagram

posted on said claim, and the copy thereof filed in the land office with said application, and as such owner this contestant, the said, does protest against the issuing of a patent thereon to said applicant, and does dispute and contest the right of said applicant therefor.

And this contestant does present the nature of his adverse claim, and does fully set forth the same in the affidavit hereto attached, marked "Exhibit A," and the further exhibits thereto attached and made part of said affidavit.

The said therefore respectfully asks the said register and receiver that all further proceedings in the matter be stayed until a final settlement and adjudication of the rights of this contestant can be had in a court of competent jurisdiction.

(Place and date.)

.

Exhibit A.

., of, county of, ss.

., being first duly sworn, deposes and says that he is a citizen of the United States, born in the state of, and is now residing in; that he is the contestant and protestant named in and who subscribed the notice and protest hereto annexed. Affiant further says that he is the owner by purchase and in the possession of the (adverse) lode or vein of quartz and other rock in place, bearing and other metals; that the said lode is situated in the mining district, county, of

(The history of the lode should be given in full; for instance, as follows:)

The affiant further says that on the day of location the premises hereinafter described were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held, or claimed by any person or persons as mining ground or otherwise, and that while the same were so vacant and unoccupied and unclaimed, to wit, on the day of, 18.., [name locators] each and all of them being citizens of the United States, entered upon and explored the premises, discovered and located the said lode, and occupied the same as mining claims; that the said premises so located and appropriated consist of feet in aerly direction, and feet in aerly direction, as will fully appear by reference to the notice of location, a duly certified copy whereof is hereunto annexed, marked "Exhibit B," and hereby made

a part of this affidavit; that the locators, after the discovery of said lode, drove a stake on said lode on the discovery claim, erected a monument of stone around said stake, and placed thereon a written notice of location describing the claim so located and appropriated, giving the names of the locators and quantity taken by each, and after doing all the acts and performing all the labor required by the laws and regulations of said mining district and territory of, the locators of said lode caused said notice to be filed and recorded in the proper books of record in the recorder's office in the said district on the day of, 18...

Affiant further says that the said locators remained continuously in possession of said lode, working upon the same, and within months from the date of said location had done and performed work and labor on said location in mining thereon and developing the same, more than days' work, and expended on said location more than hundred dollars, and by said labor and money expended upon the said mining location and claim, had developed the same, and extracted therefrom more than tons of ore.

And affiant further says that said locators in all respects complied with every custom, rule, regulation, or requirement of the mining laws, and every rule and custom established and in force in said mining district, and thereby became and were owners (except as against the paramount title of the United States), and the rightful possessors of said mining claims and premises.

And this affiant further says that locators proved and established to the satisfaction of the recorder of said mining district that they had fully complied with all the rules, customs, regulations, and requirements of the laws of said district, and thereupon the said recorder issued to the locators of said lode certificates confirming their titles and rights to said premises.

That the said lode was located and worked by the said locators as tenants in common, and they so continued in the rightful and undisputed possession thereof from the time of said location until on or about the day of, A. D. 18..., at which time the said locators and owners of said lode formed and organized under the laws of the state (or territory) of and incorporated under the name of the ".....;" and on the day of, A. D. 18..., each of the locators of said

lode conveyed said lode, and each of their rights, titles, and interest in and to said lode, to said "..... mining company."

On the said day of, 18.., the said company entered into and upon said lode, and was seised and possessed thereof, and every part and parcel of the same, and occupied and mined thereon until the day of, 18.., at which time the said mining company sold and conveyed the same to this affiant, which said several transfers and conveyances will fully appear by reference to the abstract of title, and paper hereto attached, marked "Exhibit D," and made a part of this affidavit.

(In case of individual transfers.)

And this affiant further says that the said, who located claimerly of the said lode, and the said, who located claimerly thereon, were seised and possessed of said claims, and occupied and mined thereon until the day of, 18.., at which time the said and sold and conveyed the same to, and thereupon the said was seised and possessed of said mining claims and locations, and occupied and mined thereon until the day of, 18.., at which time the said sold and conveyed the same to this affiant, as will fully appear by reference to the abstract of title, and paper hereto attached, marked "Exhibit D," and which this affiant hereby makes a part of this his affidavit.

Affiant further says that he is now and has been in the occupation and possession of the said lode since the day of, 18.., and that said lode and mining claims were located and the title thereto established several before said (applied for) lode was located. Affiant further says that said lode, as shown by the notice and diagram posted on said claim, and the copy thereof filed in the United States land office at said, with said application for a patent, crosses and overlaps said lode, and embraces about hundred feet in length by hundred feet in width of the said lode, the property of this affiant, as fully appears by reference to the diagram or map duly certified by, United States deputy surveyor, hereto attached, marked "Exhibit C," and which diagram presents a correct description of the relative locations of the said (adverse) lode, and of the pretended (applied for) lode.

Affiant further says, that he is informed and believes that

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said applicant for patent well knew that affiant was the owner in possession and entitled to the possession of so much of said mining ground embraced within the survey and diagram of said applications, as is hereinbefore stated, and that this affiant is entitled to all the and other metal in said (adverse) lode, and all that may be contained within a space of feet on each side of said (adverse) lode.

And affiant further says that this protest is made in entire good faith, and with the sole object of protecting the legal rights and property of this affiant in the said (adverse) lode and mining premises.

Subscribed and sworn to before me this day of,
A. D. 18..

Surveyor's Certificate.

On the diagram marked "Exhibit C," the surveyor must certify in effect as follows:

I hereby certify that the above diagram correctly represents conflict claimed to exist between the and lodes, as actually surveyed by me. And I further certify that the value of the labor and improvements on the (adverse) lode exceeds five hundred dollars, and said improvements consist of [state in full].

(Place and date).

.....
U. S. Deputy Surveyor.

NOTE.—This form is not proper in every case, but must be changed to suit the facts.

FORM 21.

Notice of Forfeiture.

..... county,, 18..

To

You are hereby notified that I have expended dollars in labor and improvements upon the lode, as will appear by certificate filed, 18.., in the office of the recorder of said county (or district), in order to hold said premises under the provisions of section 2324, Revised Statutes of the United States, being the amount required to hold the same for the year ending, 18.. And if within ninety days

from the service of this notice (or within ninety days after this notice by publication), you fail or refuse to contribute your proportion of such expenditure as co-owner, your interest in said claim will become the property of the subscriber, under said section 2324.

.....

NOTE.—At the expiration of one hundred and eighty days this printed notice should be recorded, with the affidavit of the newspaper publisher that the same was published for the period of ninety days, together with the affidavit of the party signing the notice, to the effect that one or more of the co-owners named in the published notice have not paid their share of the expenditure. This completes the record title.

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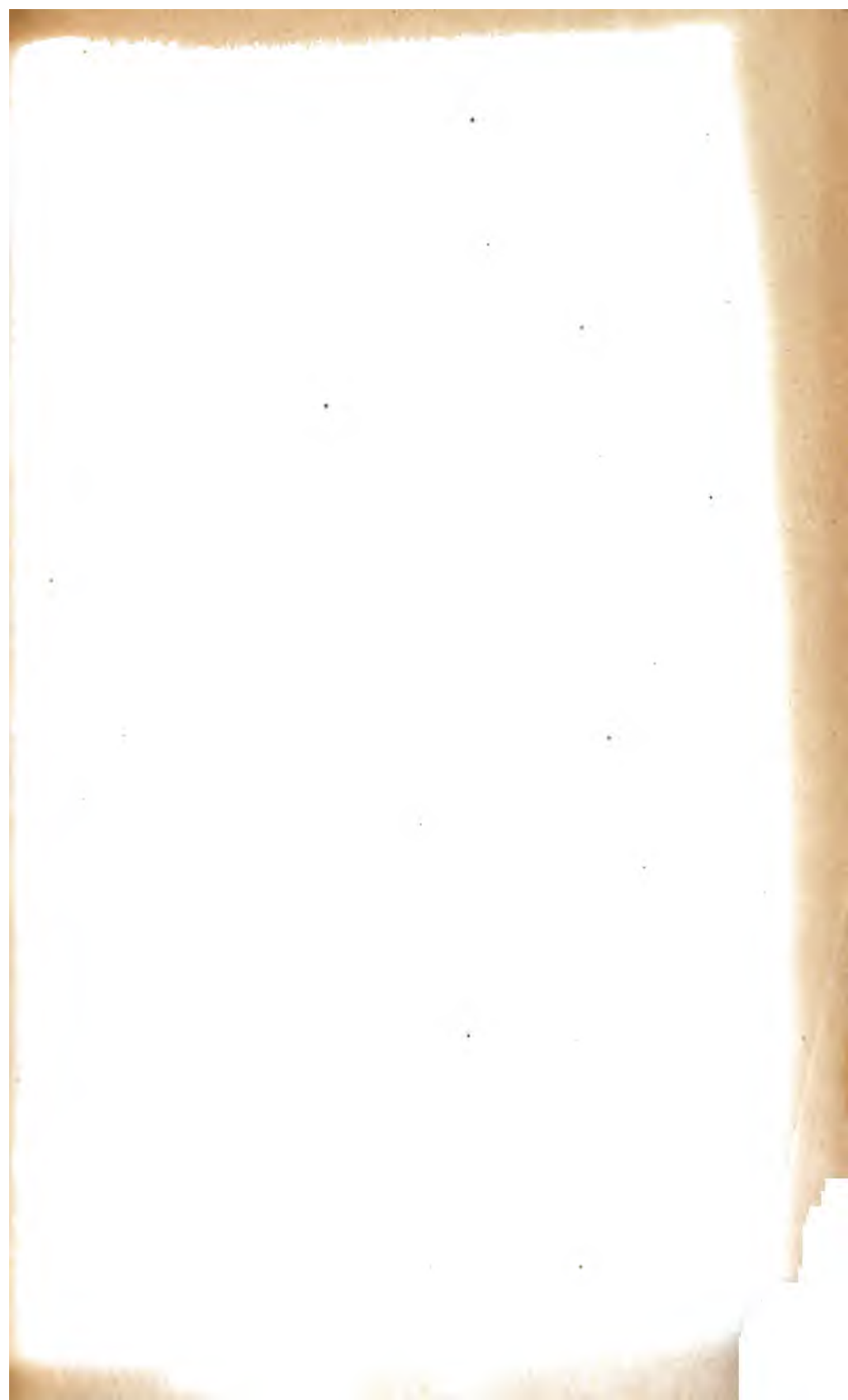
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